S. HRG. 109–853

CONFIRMATION HEARING ON THE NOMINATION OF THOMAS B. GRIFFITH, OF UTAH, TO BE CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

MARCH 8, 2005

Serial No. J–109–61

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

34–112 PDF WASHINGTON : 2007

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

COMMITTEE ON THE JUDICIARY

ARLEN SPECTER, Pennsylvania, *Chairman*

ORRIN G. HATCH, Utah
CHARLES E. GRASSLEY, Iowa
JON KYL, Arizona
MIKE DEWINE, Ohio
JEFF SESSIONS, Alabama
LINDSEY O. GRAHAM, South Carolina
JOHN CORNYN, Texas
SAM BROWNBACK, Kansas
TOM COBURN, Oklahoma

PATRICK J. LEAHY, Vermont
EDWARD M. KENNEDY, Massachusetts
JOSEPH R. BIDEN, JR., Delaware
HERBERT KOHL, Wisconsin
DIANNE FEINSTEIN, California
RUSSELL D. FEINGOLD, Wisconsin
CHARLES E. SCHUMER, New York
RICHARD J. DURBIN, Illinois

MICHAEL O'NEILL, *Chief Counsel and Staff Director*
BRUCE A. COHEN, *Democratic Chief Counsel and Staff Director*

CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

PRESENTERS

STATEMENT OF THE NOMINEE

QUESTIONS AND ANSWERS

SUBMISSIONS FOR THE RECORD

NOMINATION OF THOMAS B. GRIFFITH, OF UTAH, TO BE CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT

TUESDAY, MARCH 8, 2005

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 9:38 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter, Hatch, Leahy, and Feingold.

Chairman SPECTER. Good morning, ladies and gentlemen. The Judiciary Committee will now proceed on the nomination of Thomas B. Griffith to be United States Circuit Judge for the District of Columbia.

Senator Hatch, our distinguished former Chairman, has commitments imminently, and we will hear from him first as he makes the presentation of the witness and nominee. Senator Hatch?

PRESENTATION OF THOMAS B. GRIFFITH, NOMINEE TO BE CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT, BY HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Well, thank you, Mr. Chairman. I appreciate your courtesy to me, and, Senator Leahy, the Vice Chairman, I appreciate both of you. I do have to leave for a few minutes to make a presentation before one of the committees, but I will come back for the remainder of the hearing.

Mr. Chairman and Senator Leahy, it is my pleasure to introduce to the Committee Thomas B. Griffith, whom the President has again nominated to the U.S. Court of Appeals for the District of Columbia Circuit. Tom is a constituent of all of ours, but certainly of mine, currently living in Utah, though he was born and raised back here in the East.

Most members of the Committee should be familiar with Mr. Griffith, both because he had a hearing in November but also because he worked here in the Senate as legal counsel from 1995 to 1999. I think he will make a fine addition to the D.C. Circuit, and as the chief legal officer of the U.S. Senate, Mr. Griffith represented this institution, its committees, members, officers, and employees on a vast array of legal matters, including representing the Senate in litigation relating to our constitutional powers and privileges. He advised the Senate committees about their investiga-

tory powers and procedures and represented the Senate's institutional interests in the impeachment trial of President Clinton, the line-item veto act litigation, and in numerous Committee investigations. Mr. Griffith's legal experience in the Senate has prepared him well for the bench and has arguably better training for the judiciary than many and perhaps most other categories of legal experience. His work here required him to be nonpartisan in a sometimes highly partisan environment, and by all accounts he did a superb job. Mr. Griffith consistently exercised sound judgment, objectivity, and fairness. I emphasize this because these are qualities that are essential to service as a Federal judge.

But do not just take my word for it. Prominent Republicans and Democrats have said so as well. Mr. Griffith's former law partner, Richard Wiley, of the firm Wiley, Rein & Fielding, wrote that the nominee before us today is "an outstanding lawyer with keen judgment, congenial temperament, and impeccable personal integrity."

Seth Waxman, who we all admired, who served as Solicitor General during the Clinton administration, said that he not only has the "highest regard" for Mr. Griffith's integrity, but that he would "stake most everything on his word alone. Litigants would be in good hands with a person of Tom Griffith's character as their judge."

Fred Fielding, White House counsel to President Reagan and former Chairman of the American Bar Association's Standing Committee on the Federal Judiciary, has described Mr. Griffith as "a very special individual and a man possessed of the highest integrity. He is a fine professional who demands of himself the very best of his intellect and energies."

Again, on the Democratic side, President and Senator Clinton's personal counsel David Kendall has this to say: "The Federal bench needs judges like Tom, an excellent lawyer who is supported across the political spectrum." Mr. Kendall said Mr. Griffith "has the intellect and judgment to be an excellent judge." I think we all get the point.

Mr. Griffith has been a dedicated public servant and has demonstrated the sound judgment and temperament necessary to be an outstanding Federal appellate judge. He stands in a distinguished line of other members of the Senate family whom the Senate has confirmed to various U.S. Courts of Appeals, including Dennis Shedd, Sharon Prost, and Stephen Breyer, each of whom served as chief counsel to this Committee.

Mr. Griffith's private law practice complements his public service. After graduating summa cum laude from Brigham Young University and earning his law degree from the University of Virginia, Mr. Griffith practiced law with a private firm in North Carolina. Following his service here, he became a partner with the distinguished firm of Wiley, Rein & Fielding in Washington, D.C. He now serves as general counsel for the Brigham Young University, an international institution in Utah.

Ordinarily, a nominee with this combination of public and private sector legal experience and personal character and integrity would face a smooth confirmation process. As I described to the Committee last November, there seemed to be but two stumbling blocks, if you can even call them that. First, a series of errors left

his bar dues here in the District of Columbia unpaid for a few years. He has taken responsibility for this mistake. He does not recall the D.C. Bar sending him an invoice nor do they recall sending it to him for his dues at the end of his service as Senate legal counsel. And then he assumed his law firm was paying his dues, as it did for all the other lawyers. That was unfortunate. It was an unfortunate combination of errors, but that is all they were—errors. He certainly did not intentionally neglect to pay his bar dues and indeed promptly paid the back dues when he discovered the problem. The D.C. Bar administratively, I am informed, suspends more than 3,000 lawyers each year for late payment of dues, and they allow them up to 3 years to get those dues paid.

Legal ethics experts and former ABA Presidents confirm that such an administrative suspension is different than the disciplinary suspension that results from a lawyer knowingly refusing to pay dues. In the words of former White House counsel and appeals court Judge Abner Mikva, "this is a whole lot of nothing."

Second, some have asked whether Mr. Griffith was required to take the Utah Bar exam in order to serve in his current capacity as BYU general counsel. The simple and straightforward answer is no, so long as when he gives advice or pursues activities that can be called the "practice of law" he does so in conjunction with a member of the Utah Bar. And he had four members of the Utah Bar advising him on Utah issues.

The executive director of the Utah Bar wrote this Committee last year to say that those who follow this advice "are not engaged in the unauthorized practice of law." To my knowledge, no one has even suggested that he has done anything but scrupulously met this standard.

That conclusion was reaffirmed to me in a letter from no less than five former presidents of the Utah State Bar Association. In addition, the ABA itself thoroughly examined Mr. Griffith's record and concluded he is qualified to serve on the Federal bench.

Mr. Chairman, I would like to place in the record a letter from the Association of Corporate Counsel that notes, among other matters, that "General counsel and other in-house counsel are often asked to serve their employers in a jurisdiction where they are not admitted to practice, whether such a practice is sanctioned by the local bar or not."

James Jardine, a prominent Salt Lake City attorney who served as Special Assistant to Attorney General Griffin Bell during the Carter administration, has described Mr. Griffith as "a skilled, thoughtful, experienced lawyer." One of Mr. Jardine's comments struck me as particularly relevant to Mr. Griffith's potential service on the bench. Mr. Jardine said, "He is extraordinarily thoughtful. His intelligence is tempered by his judgment." Now, that echoes our own colleague, Senator Christopher Dodd, who said that Mr. Griffith served here in the Senate "with great competence and skill, impressing all who knew him with his knowledge of the law, and never succumbing to the temptation to bend the law to partisan ends." To me, that speaks volumes about the very qualities most important for judicial service.

The D.C. Circuit has had three vacancies for some time. The position for which Tom Griffith has been nominated has been open

for more than 5 years. This important court needs this good man to serve, and I hope the Senate will treat someone who has served among us with all the respect and dispatch that he deserves.

Now, Mr. Chairman, I have known Tom Griffith for a long, long time. He is as fine a man as I know, and he has got judgment, ability, strength of character, is a great family man, and I think would be a great balancing force on the Circuit Court of Appeals for the District of Columbia and would work with Democrats and Republicans alike on that Committee to see that justice is done in a way that it should be done. And I just could not have a higher opinion of anybody that has come before the Committee. So I hope the Committee will act forthrightly and quickly on this nomination so that he can begin the service that I think all of us will benefit from.

Thank you, Mr. Chairman, for allowing me to go forward.

Chairman SPECTER. Thank you very much, Senator Hatch.

Senator Bennett, we are going to spare you two opening statements and permit you to join in the introduction of Mr. Griffith to save you a little time, which I know you can use.

Senator LEAHY. Even though I know, of course, both Senators want to hear our opening statements, I absolutely concur with the Chairman. I have been in the position that Senator Hatch and Senator Bennett are, and you hear all the things, and I think as—I absolutely agree with you. As a matter of courtesy to two well-respected colleagues, we should allow them to go forward.

Chairman SPECTER. Well, Pat, I am sure Senator Bennett will read the record and check on what we said.

Senator LEAHY. He can hardly wait.

[Laughter.]

Chairman SPECTER. Senator Bennett, the floor is yours. Thank you very much for coming, Senator Hatch.

Senator HATCH. Thank you.

PRESENTATION OF THOMAS B. GRIFFITH, NOMINEE TO BE CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT, BY HON. ROBERT F. BENNETT, A U.S. SENATOR FROM THE STATE OF UTAH

Senator BENNETT. Thank you very much, Mr. Chairman and Senator Leahy. I appreciate your courtesy and your willingness to listen to a non-lawyer on this subject.

My senior colleague has outlined in appropriate fashion the history and legal background of Tom Griffith and the qualifications that he brings to this particular nomination. I want to simply take you back to an experience through which we all went that is probably one of the truly historic moments in the history of the United States Senate. For only the second time in American history, we had an impeachment trial in the Senate, and I remember the session that was held in the old Senate chamber where the Senate got together without the benefit of television cameras to discuss this situation. And each side had its spokesman that talked about the situation in which we found ourselves, and it was not a surprise that the first spokesman on the Democratic side was Senator Byrd, who has a position as the Senate historian, who talks about the

Senate as an institution about as well and thoroughly as anybody can.

I remember very clearly Senator Byrd's comments about the case that was before us. I cannot guarantee that these were his exact words, and there was no record taken that I know of, so we will have to depend on my memory. But he spoke of the overall case as being toxic. And as I recall, he said it has dishonored the Presidency, it has stained the House of Representatives, and it is about to do the same thing to us; that the case was sufficiently toxic that everyone who came in contact with it was either dishonored or stained or otherwise marked by it. And it was his prediction that the Senate could not escape that stain.

When the case was wrapped up by the Senate, there was almost universal agreement that the Senate had come through the experience unstained and not dishonored, that the Senate had handled it in a way that brought honor to the Senate and to its leaders. And I remember the moment when Senator Daschle and Senator Lott in the well of the Senate embraced and said, We did it, we got through this very difficult case without bringing dishonor to the institution. If anything, the institution's stature was increased.

We all remember those days. They probably will show up in our various memoirs as the time comes for us to write them. And I go back to them because the man who stood at the juncture of that case where both sides would meet and talk about the legal problems was Tom Griffith. The man who helped advise both Senator Lott and Senator Daschle, the man who was present on both sides as difficult legal questions were asked, and who on occasion helped to calm down some of the stronger partisan impulses, was Tom Griffith. He has been tested by fire in a crucible that is unique. For anyone living in American history, no one else has had to go through that kind of pressure that requires judicial temperament and understanding of the law the way Tom Griffith did. And the way he handled that impressed this non-lawyer in such a way that I recall that experience here today before this Committee. I can think of no one who has demonstrated judicial temperament under pressure better than Tom Griffith has.

And so, like Senator Hatch, I am delighted to remind the Committee that the President's lawyers in that difficult time, David Kendall and Lanny Breuer, have both endorsed this nomination. You would expect those of the current President's party to be supportive of Tom Griffith, but it is significant that those who were on the other side in that highly partisan atmosphere have also endorsed Tom Griffith. And I hope the Committee will keep that in mind as they make their decision. He obviously has my absolute and total support, and I offer it without qualification or apology. This is a man who has demonstrated that he has the capacity to fulfill the requirements of this job in a superb fashion.

Thank you.

Chairman SPECTER. Thank you very much, Senator Bennett. We appreciate your comments.

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Chairman SPECTER. Mr. Griffith, if you will come forward, we will now have opening statements by myself and, in sequence, Senator Leahy.

We welcome you here, Mr. Griffith, for this nomination hearing. I will be brief in my introduction because it has already been covered in large measure. I am particularly impressed by your being summa cum laude in your undergraduate days at Brigham Young University and being on the Law Review. I think academic achievement is very, very important. The record is already replete with your professional qualifications.

Senator Bennett has given very substantial detail as to your contribution in the impeachment trial, and I think that was a very, very important public service. You were intimately involved in the litigation on the line-item veto, and you have been involved on Committee investigations, and you have a long list of sponsors who have come forward to speak on your behalf, which shows the nonpartisan flavor: Seth Waxman, a prominent Democrat; Glen Ivey, former counsel to Senator Daschle as Leader; David Kendall, personal counsel to the President; and many, many others. Perhaps a key accolade was paid to you by Senator Dodd when you got a bipartisan resolution of commendation when Senator Dodd said, "During his tenure as legal counsel, Tom exemplified this philosophy, impressing all who knew him with his knowledge of the law, and never succumbing to the temptation to bend the law to partisan ends." And that is quite a tribute coming from Senator Dodd.

There have been some issues which have been raised which the Committee will look into: the issue of late payment of dues, and I think that there are extenuating circumstances, as I have gone through the details of the record, but we will get into those details where your dues had been paid by your law firm and you expected them to continue to be paid; on one occasion, you were not notified of the dues, which was confirmed by the D.C. Bar Association; and an issue of Utah Bar membership, none of which goes to the essential qualifications of character or integrity or judicial temperament.

I have maintained my membership in the New Jersey Bar, awaiting the return to private practice of law, and I worry every year I am going to miss the date. Sometimes I do.

Senator LEAHY. Don't we all. Not that you will return, but that we will all return.

Chairman SPECTER. We have many, many things on our minds, and if you miss a date, it is not good, but it is not the end of the world. It does not involve character or integrity or judicial temperament, the hallmarks of a judge. And the confirmation process, which I have seen now for many, many years, has accommodated people who have made mistakes substantially more important, more serious than what we are dealing with here.

There is a question about your interpretation of Title IX, and I do believe that there is a solid legal basis for what your interpretation has been on substantial proportionality based on the statute. And we will deal with that in the course of the hearing.

Now I am delighted to yield to my distinguished Ranking Member, Senator Leahy.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. Thank you, Mr. Chairman. Like you, I do also maintain my bar dues, both in Vermont and in the District of Columbia.

When we last met as a Committee for a hearing on the nomination of Thomas Griffith to the D.C. Circuit, it was a somewhat unusual hearing during a very, very brief post-election lame duck session of Congress, an unusual hearing of a controversial nominee to the second highest court in the country. I say unusual because we had a number of President Bush's nominees pending, relatively noncontroversial nominees, and had we show as much attention, we could have very easily put them through and confirmed these nominees of President Bush's. And I had urged the White House and the then Republican leadership in the Senate, but there seemed to be very, very little interest from either the White House or the Republican leadership for that kind of progress. It seemed almost that what the White House wanted to do is seek unnecessary confrontation over judicial nominees.

Now, 4 years ago, we had a situation where Senate Republicans had abused their power. They stopped more than 60 moderate and qualified judicial nominations of President Clinton's from being considered and confirmed. I find it interesting when I hear Judge Mikva, Abner Mikva, and Seth Waxman all being quoted here, and this is a reason to go forward. As I recall, when they were making similar suggestions to a number of nominees of President Clinton's, I don't recall my friends on the other side of the aisle quoting them. In fact, these nominees of President Clinton's, 61 of them, were subjected to, in effect, what has been called a "pocket filibuster." Sixty-one of them were filibustered in that sense by not being allowed to go forward.

But, nonetheless, I had a chance to become Chairman for 17 months, and I urged the White House and Senate Republicans to work with all Senators to fill judicial vacancies, including some where the vacancy existed for year after year after year after year, because one or two Republican Senators would object to one of President Clinton's—or 61 of President Clinton's nominees and would not allow them to even have a vote.

I said I really want to change this, and I pressed forward to put the Senate in position to confirm 100 of President Bush's lifetime appointments to Federal courts. We did this in 17 months. It is actually a speed record. I don't know if either Republicans or Democrats have ever moved that fast on 100. I thought we might hear something nice about it; instead we got vilification and personal attacks.

One I still remember with some wry amusement, the White House-sponsored person went on a Sunday program saying we are not moving fast enough and it is because I was anti-Catholic. My press secretary, when asked about it, said, "Well, the Senator was at Mass during that program and did not hear the comment," although the attack was continued by at least one senior member of this Committee, that senior member not Senator Specter, who was very happy to see all these judges of President Bush's going through.

But I worry about is that during those 4 years the Senate Republican leadership abandoned its responsibilities to the Senate in this regard. They chose instead to be not an independent Senate but act like a wholly owned subsidiary of the White House in their effort to turn the Federal judiciary into an arm of a particular ideological wing of the Republican Party. I believe in an independent judiciary. I don't want it to be a wing of the Democratic Party or the Republican Party. I want it to be independent. But over the last 2 years, they have bent, broke, or ignored our traditional rules governing Committee consideration of judicial nominees. They are now talking about the so-called nuclear option to destroy the one Senate rule left that allows the minority any protection, in the several times I have been in the majority something I have strongly supported to protect the then Republican minority. If you change the rules to remove this, something that has allowed the Senate from the time of the beginning of this country to serve as a check on a powerful Executive—and I might note, for those who seem not to realize, that almost every President has had judges that they propose that have not gone forward. George Washington, beginning with George Washington, he had judges he proposed, and the Senate said no and that was it.

But I say if you want to change this, you destroy the Senate. You undermine the independence and the fairness of the Federal judiciary, but you also roll back the checks and balances—checks and balances that all Americans rely on.

Just last week, the new Senator from Colorado sent a letter to the President urging that we join in common cause on these matters. I mention this because he has voted for every single one President Bush's nominees. He suggested the President make a show of good faith by ratcheting down the conflict by withdrawing divisive judicial nominations on which the Senate has previously withheld its consent. It was a sensible suggestion that was rejected out of hand by the White House which seeks absolute authority and expects the Republican majority in the Senate to go in lockstep because they say so. It does undermine the checks and balances that have served us well for over 200 years.

Now, unlike the many anonymous Republican holds and pocket filibusters that kept those 60 of President Clinton's qualified judicial nominees from moving forward, the concerns about Mr. Griffith are no secret. Mr. Griffith knows full well my concern that he has not honored the rule of law by practicing law in Utah for 5 years—I am not even going to go into the years in the District of Columbia where he practiced law without a license. I am talking about practicing law in Utah for 5 years without ever bothering to fulfill his obligation to become a member of the Utah Bar. I would assume the nominee has by now obtained a Utah driver's license and that he pays Utah State taxes. But even though he has been practicing law there since the year 2000, he is not a member of the bar.

I will be interested to learn what steps Mr. Griffith took since our last hearing to take the Utah Bar examination recently held in February or to apply for the Utah Bar examination which I understand is scheduled for this summer. By one count, he has so far foregone ten opportunities to take the Utah Bar exam while applying for and maintaining his position as general counsel at Brigham

Young University. This conscious and continuous disregard of basic legal obligations is not consistent with the respect for law we should demand of lifetime appointments to the Federal courts. He should have taken the bar. He should be a member of the Utah Bar.

Practicing law without a license or, as the bar calls it, the unauthorized practice of law is not a technicality like forgetting to pay your bar dues. In fact, in some States it is a crime. In Texas, for example, it is a third-degree felony. It is a serious dereliction of a lawyer's duty.

Now, it is a commonplace of American jurisprudence that no one is above the law. If the American people are to have confidence in our system of laws, that has to include the lawyers, and certainly without any question it has to include the judges. So I am hoping we are going to have better and more coherent and more forthright answers from Mr. Griffith about the problems with his bar membership, and I am sure he knows that those are questions he will be asked. I would expect those answers to start with a commitment to do what is now long overdue, namely, to take the Utah Bar exam and become properly licensed to practice law in Utah, where he has been practicing for the last 5 years.

This hearing marks the third hearing on the President's controversial circuit court nominations in barely more than a week. Chairman Specter is affording some of these nominees, including Mr. Griffith, another opportunity to provide the Committee and the Senate with additional information and assurance that they have earned and merit the consent of the Senate to their lifetime appointment as a custodian of the rights of all Americans. I applaud the Chairman for that and I thank him for following the proper order of this Committee. But I must say that the lack of taking the bar exam is a matter of concern to me. I know that even to our State courts in Vermont, such a nomination would be rejected out of hand for doing that. But we have very high standards in our State.

Mr. Chairman, I would ask consent to put my full statement in the record and also a number of letters and editorials.

Chairman SPECTER. Without objection, they will be made part of the record.

Senator LEAHY. Thank you.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman SPECTER. Would you stand to take the oath? Do you swear that the testimony you will give before the Senate Judiciary Committee will be the truth, the whole truth and nothing but the truth, so help you God?

Mr. GRIFFITH. I do.

Chairman SPECTER. Do you have family with you today?

Mr. GRIFFITH. I do not, Senator. My wife and three of my children are living in Utah. My wife is attending university, and my children are still in school. Some of them were able to come for my last hearing but not able to this time.

Chairman SPECTER. In the absence of family, we welcome you to the Committee.

Mr. GRIFFITH. Thank you.

Chairman SPECTER. Would you care to make an opening statement?

STATEMENT OF THOMAS B. GRIFFITH, NOMINEE TO BE CIRCUIT JUDGE FOR THE DISTRICT OF COLUMBIA CIRCUIT

Mr. GRIFFITH. I'll just be brief. I want to thank you, Mr. Chairman, for holding this hearing, and thank you, Senator Leahy, for coming.

I want to thank the President of the United States who honors me with this nomination, and thank Senators Hatch and Bennett for the kind and generous comments they made.

And I would also like to take this opportunity to say what a wonderful experience it is to be back here in the Senate where I have such wonderful memories of having served with all of you and your colleagues. I'm pleased to be here, anxious and willing to answer any questions that you might have of me.

[The biographical information of Mr. Griffith follows:]

SENATE JUDICIARY COMMITTEE QUESTIONNAIRE
THOMAS B. GRIFFITH

I. BIOGRAPHICAL INFORMATION (PUBLIC)

1. Full name (include any former names used).

Answer: Thomas Beall Griffith

2. Address: List current place of residence and office address(es).

Answer:

Place of residence: Provo, UT

Office address: Brigham Young University, A-357 ASB, Provo, UT 84602

3. Date and place of birth.

Answer: July 5, 1954; Yokohama, Japan

4. Marital Status (include maiden name of wife, or husband's name): List spouse's occupation, employer's name and business address(es).

Answer: Married; Susan Stell; homemaker

5. Education: List each college and law school you have attended, including dates of attendance, degrees received, and dates degrees were granted.

Answer:

College attended: Brigham Young University
Dates of attendance: August 1972 to April 1973; October 1975 to April 1978; January to April 1979
Degree received: Bachelor of Arts, summa cum laude
Date degree granted: April 1978

Law school attended: University of Virginia School of Law
Dates of attendance: August to December 1978; August 1982 to May 1985
Degree received: Juris Doctor
Date Degree granted: May 1985

SENATE JUDICIARY COMMITTEE QUESTIONNAIRE
THOMAS B. GRIFFITH

6. Employment Record: List (by year) all business or professional corporations, companies, firms, or other enterprises, partnerships, institutions and organizations, nonprofit or otherwise, including firms, with which you were connected as an officer, director, partner, proprietor, or employee since graduation from college.

Answer:

2000 to present	Brigham Young University. Assistant to the President and General Counsel
2004 to present	Friends of the CEELI Institute. International Advisory Board member.
1996 to present	Federalist Society for Law and Public Policy. Vice-Chairman, Federalism and Separation of Powers Practice Group.
1995 to present	American Bar Association, Central European and Eurasian Law Initiative (CEELI). Advisory Board member.
2002, 2003	United States Secretary of Education's Commission on Opportunity in Athletics. Commission member.
1999 - 2000	Advisory Commission on Electronic Commerce. General Counsel.
1996 -1999	American Bar Association, Section of Administrative Law and Regulatory Practice. *Ex officio* Council member.
1999, 2000	Wiley, Rein and Fielding. Partner.
1995 - 99	United States Senate. Senate Legal Counsel.
1989 - 95	Wiley, Rein and Fielding. Associate; partner.
1985 - 89	Robinson, Bradshaw and Hinson. Associate.
1984	Jones, Day. Summer associate.
1983	University of Virginia School of Law. Research assistant to Professor Harvey Perlman.
1982	United States Department of the Interior. Summer research assistant.

SENATE JUDICIARY COMMITTEE QUESTIONNAIRE
THOMAS B. GRIFFITH

1979 – 82	Church Educational System of the Church of Jesus Christ of Latter-day Saints. Director of programs in Baltimore, Maryland area.
1979	Pennsylvania Life Insurance Company. Summer sales associate.
1978	Washington, DC Temple of the Church of Jesus Christ of Latter-day Saints. Custodian.

7. Military Service: Have you had any military service? If so, give particulars, including the dates, branch of service, rank or rate, serial number and type of discharge received.

Answer: No.

8. Honors and Awards: List any scholarships, fellowships, honorary degrees and honorary society memberships that you believe would be of interest to the Committee.

Answer:

Edwin S. Hinckley Scholar, Brigham Young University
Valedictorian, College of Humanities, Brigham Young University
Summa cum laude, Brigham Young University
High honors with distinction, Honors Program, Brigham Young University
Member, Virginia Law Review, University of Virginia School of Law

9. Bar Associations: List all bar associations, legal or judicial-related committees or conferences of which you are or have been a member and give the titles and dates of any offices which you have held in such groups.

Answer:

Bar associations: North Carolina State Bar Association; Bar Association of the District of Columbia; American Bar Association

Legal-related committees or conferences: Federalist Society; National Association of College and University Attorneys

Titles and dates of offices held in such groups:

a. American Bar Association. From 1996 to 1999, I served as an ex officio Council Member of the Section of Administrative Law and Regulatory Practice. From 1995 to the present, I have been a member of the Advisory Board of the Central European and Eurasian Law Initiative (CEELI).

SENATE JUDICIARY COMMITTEE QUESTIONNAIRE
THOMAS B. GRIFFITH

b. Federalist Society. From 1996 to 2002, I served as a Vice-Chairman of the Federalism and Separation of Powers Practice Group. I currently serve as a Senior Advisor to that group.

10. Other Memberships: List all organizations to which you belong that are active in lobbying before public bodies. Please list all other organizations to which you belong.

Answer:

Organizations to which I belong that are active in lobbying before public bodies:

a. American Bar Association
b. The Church of Jesus Christ of Latter-day Saints
c. Republican Party

All other organizations to which I belong:

a. Federalist Society
b. Rotary International
c. National Association of College and University Attorneys

11. Court Admission: List all courts in which you have been admitted to practice, with dates of admission and lapses if such memberships lapsed. Please explain the reason for any lapse of membership. Give the same information for administrative bodies which require special admission to practice.

Answer:

Supreme Court of the United States, April, 24, 1995.

Court of Appeals of the District of Columbia and the trial courts subject thereto, March 20, 1991. Membership in the District of Columbia bar lapsed for non-payment of dues on November 30, 1998 due to a clerical oversight, but was reinstated on November 13, 2001.

United States Court of Appeals for the Fourth Circuit, February 17, 1988.

North Carolina Supreme Court and all other state trial and appellate courts subject thereto, September 13, 1985 through July 17, 1992. My membership lapsed when I moved my practice from North Carolina to the District of Columbia.

SENATE JUDICIARY COMMITTEE QUESTIONNAIRE
THOMAS B. GRIFFITH

12. Published Writings: List the titles, publishers, and dates of books, articles, reports, or other published material you have written or edited. Please supply one copy of all published material not readily available to the Committee. Also, please supply a copy of all speeches by you on issues involving constitutional law or legal policy. If there were press reports about the speech, and they are readily available to you, please supply them.

Answer:

Published material I have written or edited (attached):

a. "Lawyers and the Rule of Law," *Utah Bar Journal*, October 2003, at 12.

b. "Politics and the Atonement," in *The Rock of Our Redeemer: Talks from the 2002 BYU Women's Conference* 200 (Brigham Young University, 2002).

c. "Lawyers and the Atonement," *Clark Memorandum* (J. Reuben Clark Law School), Spring 2001, at 8. Also published as "Lawyers and the Atonement," in *Life in the Law* 233 (Galen L. Fletcher et al. eds., 2002).

d. "The Reality of Impeachment," *The American Lawyer*, August 1999, at 109.

e. Note, "Beyond Process: A Substantive Rationale for the Bill of Attainder Clause," *70 Va. L. Rev. 475* (1984).

f. "How Do We Practice Our Religion While We Practice?" *Clark Memorandum* (J. Reuben Clark Law School), Fall 2004, at 13.

Speeches I have given on issues involving constitutional law or legal policy (attached):

a. "Congressional Responses to Executive Orders." Statement to Subcommittee on Commercial and Administrative Law of the Committee on the Judiciary of the United States House of Representatives, October 28, 1999.

b. "Resurrecting the Non-delegation Doctrine." Statement as panelist at the Federalist Society Lawyers Convention, November 1998.

c. "Remedies for Presidential Misconduct." Statement as moderator of panel at the Federalist Society Lawyers Convention, November 1998.

d. "Line Item Veto Act." Statement as panelist in discussion sponsored by the Section of Administrative Law and Regulatory Practice of the American Bar Association at its annual meeting, August 1998.

e. "Disciplining Congress: The Taxing and Spending Powers." Statement as moderator of panel at the Federalist Society Lawyers Convention, November 1996.

f. "The Impeachment Trial of President Clinton." Outline of remarks given at various times and places.

g. "Investigating the President: The Role of the Government Lawyer." Given to the Utah Bar Association, September 1999.

h. "The Role of a General Counsel." Given to the Provo, Utah chapter of the American Inns of Court, August 2001.

i. "The Rule of Law." Given at a Utah Law Day event sponsored by the Attorney General of Utah, May 2003.

j. I have given variations on and combinations of two speeches titled, "Lawyers and the Atonement" and "Practicing Religion While Practicing Law."

k. "Ethical Perspectives for Perilous Times." Panel sponsored by the Dallas, Texas chapter of the J. Reuben Clark Law Society, October 2001.

l. I have participated in panel discussions discussing my work on the Secretary's Commission on Opportunity in Athletics (Title IX Commission) sponsored by the National Association of College and University Attorneys (June 2003) and the National Collegiate Athletic Association (April 2003).

13. Health: What is the present state of your health? List the date of your last physical examination.

Answer: I am in excellent health. My last physical examination took place on March 24, 2004.

14. Judicial Office: State (chronologically) any judicial offices you have held, whether such position was elected or appointed, and a description of the jurisdiction of each court.

Answer: None.

SENATE JUDICIARY COMMITTEE QUESTIONNAIRE
THOMAS B. GRIFFITH

15. Citations: If you are or have been a judge, provide: (1) citations for the ten most significant opinions you have written; (2) a short summary of and citations for all appellate opinions where your decisions were reversed or where your judgment was affirmed with significant criticism of your substantive or procedural rulings; and (3) citations for significant opinions on federal or state constitutional issues, together with the citation to appellate court rulings on such opinions. If any of the opinions listed were not officially reported, please provide copies of the opinions.

Answer: I am not nor have I been a judge.

16. Public Office: State (chronologically) any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. State (chronologically) any unsuccessful candidacies for elective public office.

Answer: I have never been a candidate for elective public office. I have held two appointed public offices:

Commissioner, Secretary of Education's Commission on Opportunity in Athletics (Title IX Commission), 2002 - 03.

Senate Legal Counsel of the United States, 1995 – 99.

17. Legal Career:

a. Describe chronologically your law practice and experience after graduation from law school including:

1. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

2. whether you practiced alone, and if so, the addresses and dates;

3. the dates, names and addresses of law firms or offices, companies or governmental agencies with which you have been connected, and the nature of your connection with each.

Answer:

1. I have not served as a clerk to a judge.

2. I have never practiced alone.

SENATE JUDICIARY COMMITTEE QUESTIONNAIRE
THOMAS B. GRIFFITH

3.

August 2000 to the present. I serve as Assistant to the President and General Counsel of Brigham Young University, A-357 ASB, Provo, UT 84602.

April 1999 to August 2000. I was a partner at Wiley, Rein and Fielding, 1776 K Street N.W., Washington, DC 20006.

March 1995 to March 1999. I served as Senate Legal Counsel of the United States, 642 Hart Senate Office Building, Washington, DC 20510.

December 1989 to March 1995. I was first an associate (1989-93) and then a partner (1994-95) at Wiley, Rein and Fielding, 1776 K Street N.W., Washington, DC 20006.

May 1985 to December 1989. I was an associate at Robinson, Bradshaw and Hinson, 101 North Tryon St., Suite 1900, Charlotte, NC 28246.

17.b.1. What has been the general character of your law practice, dividing it into periods with dates if its character has changed over the years?

Answer:

1985	General practice at a full-service corporate law firm: transactional, securities, corporate governance, and litigation work.
1986 - 89	Corporate, commercial, securities, and employment litigation.
1989 – 95	Environmental insurance coverage litigation and regulatory investigations.
1995 – 99	Legal matters related to the United States Senate. Primary focus was on Senate investigations, the work of Senate committees, the defense of Acts of Congress, and the impeachment trial of President Clinton.
1999 – 2000	Work of congressional commissions, intellectual property litigation, and environmental insurance coverage litigation.
2000 - present	Higher education law.

SENATE JUDICIARY COMMITTEE QUESTIONNAIRE
THOMAS B. GRIFFITH

17.b.2. Describe your typical former clients, and mention the areas, if any, in which you have specialized.

Answer:

Description of typical former clients: While in private practice, my clients were typically businesses involved in disputes over their corporate governance, transactions with other entities, employment matters, or in need of legal assistance to respond to regulatory investigations. Examples include a national accounting firm that was the target of an investigation by the federal Office of Thrift Supervision, insurance companies that underwrote liability policies to manufacturing entities held responsible by government agencies for the cleanup of environmental contamination, and employers whose employment practices were challenged under state tort law and federal civil rights laws. While serving the Senate, my clients were typically Senate committees conducting investigations, the Senate itself in litigation over its powers, or, in the case of the impeachment trial of President Clinton, creating processes that were fair and complete.

Areas of specialization: Insurance coverage disputes, employment law, and congressional investigations.

17.c.1. Did you appear in court frequently, occasionally, or not all? If the frequency of your appearances in court varied, describe each such variance, giving dates.

Answer: From 1985 until I became Senate Legal Counsel in 1995, I appeared in court occasionally. As an associate at Robinson, Bradshaw, and Hinson from 1985 to 1989, I appeared in four trials in state court and one trial in federal court. I also made appearances in state and federal court on motions. As an associate and then a partner at Wiley, Rein and Fielding from 1989 to 1995, I appeared in one trial in Superior Court of the District of Columbia and in a state habeas corpus proceeding in Virginia. During that time, I also made appearances in state and federal courts on various motions. Since that time, as I have become the head of legal offices, first as Senate Legal Counsel and now as general counsel at Brigham Young University, the number of my court appearances has diminished significantly. As Senate Legal Counsel, I argued the Senate's position on the constitutionality of the Line-Item Veto Act in federal district court in *Byrd v. Raines*, 956 F. Supp. 25 (D.D.C. 1997), and in *City of New York v. Clinton*, 985 F. Supp. 168 (D.D.C. 1998). As general counsel at Brigham Young University, I have made no court appearances.

17.c.2. What percentage of these appearances was in: (a) federal courts; (b) state courts of record; (c) other courts.

Answer: (a) Approximately 40% of my court appearances were in federal courts. (b) Approximately 60% of my appearances were in state courts. (c) I have made a single appearance before "other courts."

SENATE JUDICIARY COMMITTEE QUESTIONNAIRE
THOMAS B. GRIFFITH

17.c.3. What percentage of your litigation was: (a) civil; (b) criminal.

Answer: The criminal litigation in which I have been involved was representing a death row inmate in Virginia in his state and federal habeas corpus proceedings. All other litigation in which I have been involved was civil.

17.c.4. State the number of cases in courts of record you tried to verdict or judgment (rather than settled), indicating whether you were the sole counsel, chief counsel, or associate counsel.

Answer: I have tried to judgment three cases in which I was the sole counsel and three cases in which I was associate counsel.

17.c.5. What percentage of these trials was: (a) jury; (b) non-jury.

Answer: Each of these cases was non-jury.

18. Litigation: Describe the ten most significant litigated matters which you personally handled. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case: (a) the date of representation; (b) the name of the court and the name of the judge or judges before whom the case was litigated; and (c) the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

Answer:

1. *The Impeachment Trial of President Clinton.* In 1998 and 1999, I represented the institutional interests of the United States Senate in the impeachment trial of President Clinton. The President had been impeached by the House of Representatives on charges that he had obstructed justice in a lawsuit in which he was a defendant and that he had committed perjury before a grand jury that was investigating allegations that he had obstructed justice in that lawsuit. My role was to advise the Senate leadership, its members, officers, and employees how to conduct an impeachment trial consistent with the Constitution, Senate rules and precedent, and judicial decisions. I was involved in the planning of the trial and was present throughout the Senate proceedings. I also advised the Senate leadership, its members, officers, and employees throughout the trial. I represented the interests of the Senate in negotiations over the conduct of the trial with the President of the United States, the House of Representatives, the Chief Justice of the United States, and the independent counsel. The Senate did not remove the President from office.

SENATE JUDICIARY COMMITTEE QUESTIONNAIRE
THOMAS B. GRIFFITH

My co-counsel during the trial was Deputy Senate Legal Counsel Morgan J. Frankel, 642 Hart Senate Office Building, Washington, DC 20510, 202-224-4435. The principal counsel for the House of Representatives was Representative Henry J. Hyde, 2110 Rayburn House Office Building, Washington, DC 20515, 202-225-4561. The principal counsel for the President of the United States was Gregory B. Craig, Williams and Connolly, 725 Twelfth St., N.W., Washington, DC, 20005, 202-434-5506. The principal counsel for the Chief Justice of the United States was James C. Duff, Baker, Donelson, Bearman and Caldwell, Lincoln Square, 555 Eleventh St., N.W., Sixth Floor, Washington, DC 20004, 202-508-3483.

2. *Clinton v. City of New York*, 524 U.S. 417 (1998). As Senate Legal Counsel, I represented the institutional interests of the United States Senate in a challenge to the constitutionality of the Line-Item Veto Act brought by the City of New York, among others. By statute, the challenge was to be considered initially by the federal district court in the District of Columbia, followed by appellate review by the Supreme Court of the United States. By resolution sponsored by the Republican and Democratic Leaders of the Senate, the Senate, by unanimous consent, directed the Senate Legal Counsel to appear in the case as *amicus curiae* in support of the Executive's view that the Act was constitutional. The Senate appeared in the case, filed briefs, and was given time to argue before the federal district court. I argued for the Senate. The district court ruled that the Act was unconstitutional. The Executive appealed the case to the Supreme Court. The Senate filed briefs with the Supreme Court, but, after consultation with the Solicitor General of the United States, it was determined that the Senate would not seek time to argue. I participated in the preparations of the Solicitor General for oral argument. The Court struck down the Act by a vote of 7-2 on the ground that it violated the Presentment Clause of the Constitution.

My co-counsel was Deputy Senate Legal Counsel Morgan J. Frankel, 642 Hart Senate Office Building, Washington, DC 20510, 202-224-4435. The principal counsel for the United States was Seth P. Waxman, then-Solicitor General of the United States, Wilmer, Cutler and Pickering, 2445 M St., N.W., Washington, DC 20037, 202-663-6800. The principal counsel for the City of New York was Charles J. Cooper, Cooper and Kirk, 1500 K St., N.W., Suite 200, Washington, DC 20005, 202-220-9600. The principal counsel for the Snake River Potato Growers was Louis R. Cohen, Wilmer, Cutler and Pickering, 2445 M St., N.W., Washington, DC 20037, 202-663-6700.

3. *Raines v. Byrd*, 512 U.S. 811 (1997). As Senate Legal Counsel, I represented the institutional interests of the United States Senate in a challenge to the constitutionality of the Line-Item Veto Act brought by Senator Robert Byrd and others. By statute, the challenge was to be considered initially by the federal district court in the District of Columbia, followed by appellate review by the Supreme Court of the United States. By resolution sponsored by the Republican and Democratic Leaders of the Senate, the Senate, by unanimous consent, directed the Senate Legal Counsel to appear in the case as *amicus curiae* in support of the Executive's view that the Act was constitutional. The Senate appeared in the case, filed briefs, and was given time to argue before the federal

district court. I argued for the Senate. The district court ruled that the Act was unconstitutional. The Executive appealed the case to the Supreme Court of the United States. The Senate filed briefs in the Supreme Court, but, after consultation with the Solicitor General of the United States, it was determined that the Senate would not seek time to argue. I participated in the preparations of the Solicitor General for oral argument. The Supreme Court dismissed plaintiffs' case on the ground that members of Congress lacked standing to challenge the constitutionality of the Act, an argument in which the Senate did not participate.

My co-counsel was Deputy Senate Legal Counsel Morgan J. Frankel, 642 Hart Senate Office Building, Washington, DC 20510, 202-224-4435. The principal counsel for the United States was Walter Dellinger, then-Acting Solicitor General of the United States, O'Melveny and Myers, 555 13th St., N.W., Suite 500 West, Washington, DC 20004, 202-383-5319. The principal counsel for plaintiffs before the district court was Charles J. Cooper, Cooper and Kirk, 1500 K St., N.W., Suite 200, Washington, DC 20005, 202-220-9600. The principal counsel for the appellees before the Supreme Court was Alan B. Morrison, Public Citizen Litigation Group, 1600 20th St., N.W., Washington, DC 20009, 202-588-1000.

4. *Houston General Insurance Co. v. American General Lloyds*, No. 141-101105-86 (Tex. Dist. Ct., Tarrant County, 1993). I was the principal associate representing American General Lloyds in a dispute between insurance carriers regarding who would bear the costs of cleaning up the Brio waste site near Houston, Texas. In the face of a ruling from the trial court judge, the Honorable Catherine Adamski Gant, setting a trial date far in advance of what the parties expected, I was the principal attorney involved in gathering the factual material in preparation for dispositive motions and trial. As such, in addition to taking depositions and preparing and arguing motions, I coordinated the activities of many other attorneys. I also participated as counsel in the mock trial staged to prepare for trial. The litigation was settled prior to trial.

My co-counsel was Walter J. Andrews, then-partner at Wiley, Rein, and Fielding, Shaw Pittman, 1650 Tysons Boulevard, McLean, VA 22102, 703-770-7900. The principal counsel for the Houston General Insurance Co. was Martin B. McNamara, Gibson, Dunn and Crutcher, 2100 McKinney Ave., Suite 1100, Dallas, Texas 75201, 214-698-3127.

5. *Office of Thrift Supervision v. Ernst and Young* (1992). I was the principal associate representing Ernst and Young in an investigation by the Office of Thrift Supervision related to the firm's involvement in audit work done for failed thrifts. Prior to making Ernst and Young the target of an investigation, the OTS had frozen the assets of the Kaye Scholer law firm following an investigation of its legal work for failed thrifts. As the principal associate, I supervised and coordinated a team of approximately 20 lawyers who were helping prepare a response to the OTS investigation. The investigation ended with a settlement that involved a $400 million payment from Ernst and Young to the government.

SENATE JUDICIARY COMMITTEE QUESTIONNAIRE
THOMAS B. GRIFFITH

My co-counsel was Fred F. Fielding, Wiley, Rein, and Fielding, 1776 K St., N.W., Washington, DC 20006, 202-719-7320. The principal counsel for the Office of Thrift Supervision was Harris Weinstein, then-chief counsel of the Office of Thrift Supervision, Covington and Burling, 1201 Pennsylvania Ave., N.W., Washington, DC 20004, 202-662-5302.

6. *Credit International Bank v. Lucey* (D.C. Super. Ct., 1990) I was the principal associate in the trial of an employment contract dispute between Credit International Bank, which my firm represented, and Charles Emmet Lucey. Mr. Lucey had been dismissed as the chief executive officer of the bank, but claimed that he was entitled to certain remuneration under the terms of an alleged employment contract. The bank disputed the existence of the contract. The alleged contract contained an arbitration clause. The trial was to determine whether there was an enforceable agreement to submit the dispute to arbitration. As principal associate, I was primarily responsible for the preparation of the legal and factual arguments to be made at trial and the motions and briefs filed with the court. Judge Nan Huhn ruled in our favor on all points.

My co-counsel was Fred F. Fielding, Wiley, Rein, and Fielding, 1776 K St., N.W., Washington, DC 20006, 202-719-7320. The principal counsel for Mr. Lucey was David Webster, Caplin and Drysdale, One Thomas Circle, N.W., Washington, DC 20005, 202-862-5000.

7. *Joseph Patrick Payne, Sr. v. Charles Thompson, Warden, Mecklenburg Correctional Center, et al.* (Va. Cir. Ct. Powhatan County, 1991). From 1991 through 1996, my law firm took on a pro bono representation as part of the American Bar Association's death penalty project. The firm represented Joseph Payne who, while an inmate serving a life sentence in Virginia's correctional system, had been convicted of murdering a fellow inmate. My firm represented Payne in his state and federal habeas proceedings. I became involved in the matter in preparation for the state habeas evidentiary hearing. Along with one other associate at the firm and a lawyer who was expert in criminal matters, I helped try the case at the evidentiary hearing before Judge Thomas V. Warren, Circuit Court Judge, Powhatan County, Virginia, in October 1991, and then participated in the briefing of the case through its subsequent reviews up to and including an unsuccessful petition seeking a writ of certiorari from the United States Supreme Court. My involvement in the case ceased when I became Senate Legal Counsel in March 1995. Prior to my leaving the case, I was the principal attorney charged with conceiving and executing a "pardon strategy". That strategy proved successful when Governor George Allen commuted Payne's death sentence in 1995 on the evening of his scheduled execution.

My co-counsel in the case was Paul Khoury, Wiley, Rein, and Fielding, 1776 K St., N.W., Washington, DC 20006, 202-719-7346. The principal counsel for the Commonwealth of Virginia was Thomas B. Bagwell, Office of the Attorney General, 900 East Main St., Richmond, VA 23219, 804-786-2071.

SENATE JUDICIARY COMMITTEE QUESTIONNAIRE
THOMAS B. GRIFFITH

8. *Stott v. Haworth*, 916 F.2d 134 (4th Cir. 1990). From 1987 to 1989, I participated in my firm's defense of the Governor of North Carolina and a number of his cabinet secretaries in a class action lawsuit brought in the Eastern District of North Carolina by state employees alleging that the newly-elected governor had taken adverse personnel actions against them based on improper partisan political concerns. My primary involvement was in the discovery and brief writing that resulted in the partial granting of our motions for summary judgment by Judge W. Earl Britt. I also participated in the briefing of the appeal to the Fourth Circuit, which, in an opinion written by Donald Russell, Circuit Judge, ruled in favor of the defendants on all points.

My co-counsel in the case was John R. Wester, Robinson, Bradshaw, and Hinson, 101 North Tryon Street, Suite 1900, Charlotte, NC 28246, 704-377-2536. The principal counsel for plaintiffs was Melinda Lawrence, Patterson, Harkavy and Lawrence, 200 West Morgan St., Raleigh, NC 27611, 919-755-1812.

9. *Loral Fairchild Corporation v. Sony Corporation.*, 181 F.3d 1313 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 1075 (2000). I was the principal author of the legal arguments in the petition for the writ of certiorari. My firm had represented petitioner Loral Fairchild in an infringement suit against Sony and others over the use of charge coupled devices, a technology vital to camcorders. Sitting by designation in the Eastern District of New York, Circuit Judge Randall Rader overturned a jury verdict in favor of Loral Fairchild and granted Sony's motion for judgment as a matter of law. Judge Rader held that prosecution history estoppel precluded Loral Fairchild from asserting its infringement claims under the doctrine of equivalents. In doing so, he relied upon Loral Fairchild's citation of an article in a confidential abandoned application. On appeal, the Federal Circuit affirmed in an opinion written by Judge Glenn L. Archer, Jr. Our petition for certiorari argued that the Federal Circuit's reliance upon prosecution history estoppel to limit the use of the doctrine of equivalents ran afoul of the Supreme Court's ruling in *Warner-Jenkinson Co. v. Hilton Davis Chemical Co.*, 520 U.S. 17 (1997), that the use of estoppel must be consistent with the public notice function of the law. The Court denied our petition.

My co-counsel was James H. Wallace, Jr., Wiley, Rein, and Fielding, 1776 K St., N.W., Washington, DC 20006, 202-719-7000. The principal counsel for Sony Corporation was Charles E. Lipsey, Finnegan, Henderson, Farabow, Garrett and Dunner, Two Freedom Square, 11955 Freedom Dr., Reston, VA 20190, 571-203-2700.

10. *Alabama Plating Co. v. United States Fidelity and Guaranty Co.*, 690 So. 2d 331 (Ala. 1996). From 1993 through March 1995, I was the principal attorney in the representation of a liability insurer in a suit brought by a manufacturer seeking insurance coverage for the costs of complying with governmental orders requiring the cleanup of contamination it had caused over a number of years. My involvement in the case ceased when I became Senate Legal Counsel in 1995. Prior to that time, however, I directed and took most of the discovery that formed the basis for the defendant's motion for summary judgment that was granted by Judge Oliver P. Head of the Circuit Court of Shelby

County, Alabama (No. CV-92-623). On appeal, after I was no longer involved in the matter, the Alabama Supreme Court affirmed Judge Head's ruling that the pollution exclusion cause in the contract was clear and unambiguous, but, on rehearing reversed and withdrew its prior decision and held, *inter alia*, that the pollution exclusion clause in the insurance contract was ambiguous and did not bar coverage for gradual pollution.

My co-counsel was Walter J. Andrews, then-partner at Wiley, Rein, and Fielding, Shaw Pittman, 1650 Tysons Boulevard, McLean, VA 22102, 703-770-7900. The principal counsel for plaintiff was John W. Fried, Fried, Epstein, and Rettig, Herald Square, 1350 Broadway, Suite 1400, New York, NY 10018, 212-268-7111.

11. *United States Fidelity and Guaranty Co. v. Mississippi Chemical Corp.*, No. J89-0305(W)(S.D. Miss. 1994). I was the principal attorney in the representation of an insurance carrier seeking declaratory relief against a major industrial company in Mississippi over the terms of a liability insurance contract which the defendant claimed provided coverage for the costs of complying with governmental orders to cleanup its contamination of the environment. I was primarily responsible for conducting the discovery phase of the litigation in preparation for argument over dispositive motions and trial. The litigation settled before trial.

My co-counsel was Walter J. Andrews, then-partner at Wiley, Rein, and Fielding, Shaw Pittman, 1650 Tysons Boulevard, McLean, VA 22102, 703-770-7900. The principal counsel for Mississippi Chemical Corporation was Larry D. Moffett, Daniel, Coker, Horton, and Bell, 265 North Lamar Blvd., Suite R, Oxford, MS 38655, 662-232-8979.

19. Legal Activities: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe the nature of your participation in this question, please omit any information protected by the attorney-client privilege (unless the privilege has been waived.)

Answer:

1. *Senate Whitewater II Investigation (1995-96).* As Senate Legal Counsel, I represented the institutional interests of the Senate in the investigation conducted by the Special Committee to Investigate Whitewater Development Corporation and Related Matters. My activities involved advising the Chairman and Ranking Member of the Special Committee, its members, and the Republican and Democratic leadership of the Senate on a range of issues, including the powers of Senate committees to investigate, immunity orders, speech or debate clause protection for Senate members and employees, the application of the Fifth Amendment privilege in Senate investigations, special government employees, congressional documentary subpoena practice, questioning at hearings, leaks, and the civil enforcement of Senate subpoenas. During the course of the investigation, the Senate debated and passed a resolution directing the Senate Legal Counsel to enforce a documentary subpoena against an Associate White House Counsel.

SENATE JUDICIARY COMMITTEE QUESTIONNAIRE
THOMAS B. GRIFFITH

On the eve of the Senate filing an enforcement action, the White House produced the documents sought.

2. *Senate Campaign Finance Investigation (1997-98).* As Senate Legal Counsel, I represented the institutional interests of the Senate in the investigation conducted by the Committee on Governmental Affairs into the financing of the 1996 presidential campaigns of the Democratic and Republican parties. My activities involved advising the Chairman and Ranking Member of the Committee, its members, and the Republican and Democratic leadership of the Senate on a range of issues, including the powers of Senate committees to investigate, immunity orders, the law and practice of executive privilege, the application of the Fifth Amendment privilege in Senate investigations, congressional documentary subpoena practice, questioning at hearings, and the civil enforcement of Senate subpoenas.

3. *Louisiana Contested Election Investigation (1997).* As Senate Legal Counsel, I represented the institutional interests of the Senate in the investigation conducted by the Committee on Rules and Administration into the 1996 Louisiana senatorial election. My activities involved advising the Chairman and Ranking Member of the Committee, its members, and the Republican and Democratic leadership of the Senate on a range of issues, including the powers of Senate committees to investigate, the history and precedential value of contested election investigations, the interpretation and application of the Committee's rules with respect to the calling of witnesses at hearings, congressional documentary subpoena practice, and the conduct of hearings.

4. *Advisory Commission on Electronic Commerce (1999-2000).* I was asked by Governor James Gilmore of Virginia to serve as general counsel to the Advisory Commission on Electronic Commerce. Governor Gilmore served as Chairman of that commission, which was created by Congress to make recommendations regarding whether states should be allowed to levy and collect sales tax on the purchase of goods over the Internet. My activities involved advising the Chairman and the Commission members on the law governing congressional commissions, the application of the statutory language creating the Commission to its work, including the authority of the Commission to report its work to Congress and make policy proposals on the basis of a majority vote alone.

5. *Secretary of Education's Commission on Opportunity in Athletics (2002-03).* I served as a member of the Secretary's Commission, which was given a charge to study the success of Title IX in collegiate athletics and to make recommendations how to improve efforts to expand opportunities in collegiate athletics for men and women. The Commission held a series of town hall style meetings around the nation over a six-month period, heard testimony from scores of witnesses, and read thousands of pages of written material. The Commission produced a report to the Secretary that contained a number of modest recommendations for ways to improve the enforcement of Title IX.

SENATE JUDICIARY COMMITTEE QUESTIONNAIRE
THOMAS B. GRIFFITH

6. *American Bar Association's Central European and Eurasian Law Initiative (CEELI) (1996 – present).* I serve on the Advisory Board of CEELI. In addition to attending the twice yearly meetings of the Board and traveling to Central Europe and Eurasia on occasion to meet with CEELI's in-country staff, my primary contribution has been as a liaison to the Senate Republican leadership staff, to keep them informed of CEELI's rule of law programs, and to encourage their continued support.

7. *Celebrex.* As general counsel at Brigham Young University, I oversee a team of lawyers comprised of inside and outside counsel representing the interests of the University and one of its most distinguished professors in a dispute with a major pharmaceutical company over the respective rights to the profits that have been generated by the sale of Celebrex. The University claims that the primary research that formed the basis for the development of Celebrex was done by the University and its professor, and that neither has been adequately compensated for that work.

SENATE JUDICIARY COMMITTEE QUESTIONNAIRE
THOMAS B. GRIFFITH

III. GENERAL (PUBLIC)

1. An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

Answer: Between 1991 and 1995, I was involved in Wiley, Rein, and Fielding's pro bono representation of a death row inmate's effort to overturn his death sentence. I was one of two attorneys at the firm who participated in the preparation for and trial of the state habeas evidentiary hearing. I also participated in the writing of briefs in the subsequent efforts to overturn his conviction. Although I do not have access to records that would identify the precise amount of time I spent on this matter over the years, I would estimate that it involved several hundred hours. While an associate at my law firm in Charlotte, North Carolina from 1985 through 1989, I participated in a pro bono project in which I represented disadvantaged students in the public school system during the due process hearings that accompanied disciplinary actions that might lead to suspension. I would estimate that I spent fifty hours in those representations. As a member of my church, I have been involved on an ongoing basis in projects for the hungry at neighborhood emergency food pantries and "soup kitchens." As a bishop (lay leader) of my congregation, I was primarily responsible for the physical and material needs of the poor within our congregation. A recent project for which I am responsible and supervise involves sending university students from the twelve congregations over which I have responsibility to tutor disadvantaged Latino immigrant children in a local elementary school, to visit the elderly in nursing care facilities, and to visit youth confined to detention centers. I have no way to estimate the time involved in these church projects. They are continuing and ongoing and simply part of the fabric of life.

2. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, or religion. Do you currently belong, or have you belonged, to any organization which discriminates – through either formal membership requirements or the practical implementation of membership policies? If so, list, with dates of membership. What have you done to try to change these policies?

Answer: No.

SENATE JUDICIARY COMMITTEE QUESTIONNAIRE
THOMAS B. GRIFFITH

3. Is there a selection commission in your jurisdiction to recommend candidates for nomination to the federal courts? If so, did it recommend your nomination? Please describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and interviews in which you participated).

Answer: I am not aware of any such selection commission in my jurisdiction. Shortly after I left my position as Senate Legal Counsel in 1999, I participated in discussions with aides to various Senators about my interest in becoming a federal appeals court judge. Those discussions have continued over time. In the summer of 1999, Senator Hatch, who I had come to know during my tenure as Senate Legal Counsel, discussed with me my interest in being a federal appeals court judge. In the fall of 2003, I was called by an attorney in the Office of Counsel to the President who asked whether I would like to be considered as a possible nominee to the United States Court of Appeals for the District of Columbia Circuit. I said that I would and was asked to come to an interview in the Counsel's office. Following that interview, I spoke to Senator Hatch about my interest in being nominated. During the first week of March 2004, I learned that to take this process to the next step, I must supply the Department of Justice with requested information so that a thorough review of my background and qualifications could take place.

4. Has anyone involved in the process of selecting you as a judicial nominee discussed with you any specific case, legal issue or question in a manner that could reasonably be interpreted as asking how you would rule on such case, issue, or question? If so, please explain fully.

Answer: No.

5. Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

a. A tendency by the judiciary toward problem-solution rather than grievance-resolution;

b. A tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;

SENATE JUDICIARY COMMITTEE QUESTIONNAIRE
THOMAS B. GRIFFITH

c. A tendency by the judiciary to impose broad affirmative duties upon governments and society;

d. A tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and

e. A tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

Answer: The genius and success of the American constitutional system are due in large measure to the separation of powers. For that system to work and create the ordered liberty necessary to sustain the nation and allow the protection and expansion of opportunity, the actors within that system must honor the limits set upon their authority. For the Federal judiciary, that means, first and foremost, that a judge must work to understand the will of the people expressed in the Constitution, statute, and law and apply that to resolve the dispute at hand. A judge is bound in like manner by judicial precedent and especially those determinations made by the Supreme Court that apply to the dispute before him. It is inappropriate for a judge to act as if he were a member of the Legislative or Executive branches. Policy decisions must be made only by those responsive to the electorate. Failure of the Federal judiciary to heed these limits will, over time, undermine the foundations of our constitutional system.

Chairman SPECTER. Mr. Griffith, why would you like to be a Federal judge? What is your interest in this public service?

Mr. GRIFFITH. Well, I'd start with the comment you just made, it's public service. I, as do all of you, love our country, love our Nation, and am anxious and desirous to be of service where I can be. As I mentioned, I'm honored that the President nominated me. I would like to be able to use the life experience I have, the legal training that I have to be of help to the Nation in this way in being in the Federal Judiciary.

Chairman SPECTER. Give us your essentials of your legal background which you think qualifies you for the high position of Circuit Court Judge?

Mr. GRIFFITH. I've been a practicing lawyer since 1985 in a variety of contexts. I began my legal career, as was mentioned earlier, at a law firm in Charlotte, North Carolina, where I was extensively involved first in transactional work and then later in litigation experience.

I came to Washington, D.C., which is my home, in 1989 and became associated with a prominent law firm in Washington, D.C., Wiley, Rein and Fielding. My practice there was primarily in litigation, litigation involving complex transactions, complex commercial disputes in a regulatory environment. I was made a partner at that law firm, and then in 1995 was chosen by the United States Senate to be its Senate legal counsel.

In that capacity, as Senate legal counsel, I represented, along with the other—I was the head of the office. There were other marvelous lawyers in the office, and I succeeded one of the finest lawyers I've ever met, Michael Davidson.

Chairman SPECTER. Never mind, Mr. Davidson, let's talk about you.

Mr. GRIFFITH. Okay.

Chairman SPECTER. Has there ever been a challenge to your character or integrity?

Mr. GRIFFITH. There has not, Senator.

Chairman SPECTER. How about your judicial temperament? We heard lofty praise from Senator Hatch, who has great credibility with this Committee, about your judicial temperament during the impeachment proceedings. I remember those very well. Could you give us a specific illustration as to how you brought the parties together, because it was not all sweetness and light.

Mr. GRIFFITH. It wasn't, and I need to be delicate here. Many of the things in which I was involved involved the attorney client privilege. But having said that, to me the greatest challenge of the impeachment proceeding, and also it's great opportunity, was that you had all of the branches of Government represented with very different interests, and—

Chairman SPECTER. Would you say there was a lapse in your work as legal counsel when you failed to give me advice not to cite Scottish law?

[Laughter.]

Mr. GRIFFITH. If you say it was a lapse.

Chairman SPECTER. I withdraw that question, Mr. Griffith.

[Laughter.]

Mr. GRIFFITH. Thank you, thank you. I actually remember the conversation well, but if you want to waive the privilege.

Chairman SPECTER. Mr. Griffith, onto your District of Columbia bar dues. What is that all about?

Mr. GRIFFITH. Well, I made a mistake, and I want to make it clear that it was my mistake and no one else's mistake. The mistake I made was that in the first instance I relied on the D.C. Bar to send me notices of when my bar dues were paid. I shouldn't have done that.

Chairman SPECTER. Did you fail to pay those dues willfully?

Mr. GRIFFITH. No, not at all.

Chairman SPECTER. Try to save all that money, Mr. Griffith?

Mr. GRIFFITH. No, I did not. I was unaware that my bar membership had been administratively suspended for failure to pay dues.

Chairman SPECTER. How about your Utah Bar membership? The record has references to your close association with other members of the bar. What happened exactly with respect to that issue?

Mr. GRIFFITH. Senator, thank you. I'd be happy to try and clarify your understanding of that. It is the practice of the Utah Bar Association, as is set forth in letters that this Committee has received, that in-house counsel in Utah need not be licensed in Utah provided they are closely associated with active members of the Utah Bar and make no court appearances. That's precisely how I have governed my dealings at the university since I arrived in August 2000. There are now five attorneys in the office. The other four attorneys are active members of the Utah Bar. And I have been very careful since I arrived there not to participate in giving any legal advice or the practice of law in any form or fashion unless I am involved with one of these attorneys.

Now, I didn't do that simply because that's the requirement of the Utah Bar. I also did that because that's the way I practice law. My client, the university, will always be better served if my opinion represents a collaborative effort with other lawyers, and in our office we do that all the time. Everyone's door is open. We're in and out of each other's office. We collaborate a great deal.

So there's no legal advice. There's no activity in which I've been engaged in the practice of law since I've arrived at the university that has not involved other lawyers. Again, I did that because that's the best practice, and also be it's consistent with the Utah Bar's approach to how in-house counsel should conduct their affairs.

Chairman SPECTER. Senator Leahy.

Senator LEAHY. Let us go back to this. My opening statement, which you heard, I just want to make sure I was correct in some things I said I there. Now, since moving to Utah 5 years ago, the summer of 2000, have you gotten a Utah driver's license?

Mr. GRIFFITH. Yes, sir, I do.

Senator LEAHY. Do you pay Utah State taxes?

Mr. GRIFFITH. I do.

Senator LEAHY. Now, in your answers to our written questions, you state plainly you practiced law in Utah since the beginning of your responsibility at BYU in 2000. And now you have admitted in the Utah law there is no general counsel or in-house counsel exception to the Utah law that says one has to be licensed in Utah to

practice law in Utah. You further agree there is no exception in law for those who closely associate themselves with Utah licensed lawyers. I have looked at the law. I have looked at the regs. I have looked at Supreme Court decisions. I find no general counsel, no in-house counsel, no closely associate kind of exception.

The question I have is this: since you accepted the job at BYU there have been 10 opportunities, including just last month, to take Utah Bar. Have you taken it?

Mr. GRIFFITH. I have not, Senator.

Senator LEAHY. The deadline for submitting an application for next July's administration of the Utah Bar was a week ago last Tuesday, March 1st. Did you submit an application?

Mr. GRIFFITH. No, sir.

Senator LEAHY. There is time to get a late application by next Tuesday, the 15th. Are you going to send in an application?

Mr. GRIFFITH. I'm not planning on doing that, Senator.

Senator LEAHY. How about April 1st? That is the absolute last date you can do for July?

Mr. GRIFFITH. I'm not planning on taking the Utah Bar in July.

Senator LEAHY. Let me make sure I understand. You practice law in Utah, you are a general counsel. Utah law, as written by the Utah State Legislature, interpreted by the Utah Supreme Court, not some letters from some past bar association person, but the Utah law written by the Utah State legislature and interpreted by the Utah Supreme Court, says you have to be a member of the Utah Bar if you practice law in Utah. There are no exceptions. To be a member of the Utah Bar you have to take the examination. You have not taken it, you have no plans to take it. Are you saying that even though there is no statutory case law, somehow somebody is empowered to create an exception to permit you to practice law in Utah indefinitely without ever being licensed in Utah? It is kind of an interesting exception.

Mr. GRIFFITH. Thank you for giving me the opportunity to clarify my understanding of this, Senator Leahy. It's my understanding that it has been the consistent practice of the Utah Bar for years now to treat in-house counsel in a way that in-house counsel is not required to be licensed in Utah provided they are closely associated with Utah lawyers and they make no court appearances. That was my—

Senator LEAHY. Did you find anything in the statute or case law that says that?

Mr. GRIFFITH. No. This is the interpretation of the Utah Bar of the statutes—

Senator LEAHY. Find anything in the statute yourself or the case law that says that?

Mr. GRIFFITH. I'm not aware of—

Senator LEAHY. Because we cannot find anything. Do you know people that practicing law that way in Utah?

Mr. GRIFFITH. I am told that it is very common practice in Utah—

Senator LEAHY. Do you know any of these people?

Mr. GRIFFITH.—that in-house counsel—I know of some, and I've heard of others. I have not take—

Senator LEAHY. But you do not find anything in the statute or the case law that says you can do that?

Mr. GRIFFITH. No. I know of nothing in the statute that allows that.

Senator LEAHY. That is kind of a activist interpretation, is it not? Or—

Mr. GRIFFITH. May I respond?

Senator LEAHY. I mean I just like to say, see some of the activist judges, judicial nominees come up.

Mr. GRIFFITH. I'm relying on the view of the Utah Bar about the rules that govern the practice of law in Utah.

Senator LEAHY. I think I would rely on the statute and the case law.

You know, throughout our history we have had judges who stood up to proper sentiment, and they protected minorities or people whose views made them outcasts, pariahs. Have you ever had an instance in your professional career where you took an unpopular stand or represented an unpopular client and stood by them under pressure?

Mr. GRIFFITH. Yes, sir, a number of occasions.

Senator LEAHY. Tell me, please.

Mr. GRIFFITH. One that I believe is referred to in the Senate Judiciary Committee questionnaire was while an associate at Wiley, Rein and Fielding in Washington, D.C., I along with several other of the associates took on an American Bar Association pro bono death penalty project. We represented an inmate in the Virginia Correctional system who had been accused of committing murder while he was in the prison system. My firm—and I was one of the lawyers who took an active role in his representation through the habeas proceedings. My role after the hearing changed in that I was in charge of what we referred to as the pardon strategy for this death row inmate. We fortunately saw that strategy through to a successful conclusion, as the Governor of the State of Virginia commuted his sentence. That's one example.

When I was in North Carolina I was involved in pro bono projects with the local bar association there, representing disadvantaged students who had been suspended from their high schools and were entitled to representation in the due process hearings. So those are a couple of examples.

Senator LEAHY. I appreciate it.

Mr. Chairman, my time is up. I just want to put in the record the name of university general counsel, the general counsel—

Chairman SPECTER. Chairman Leahy, take whatever additional time you would like.

Senator LEAHY. I appreciate the courtesy of the Chairman, but I want to put in the record John Morris, who is the General Counsel at University of Utah; Craig Simpler, University Counsel for Utah State University; Kelly DeHill, the General Counsel at Westminster College; and Mr. Griffith's predecessor, Eugene Bremhall, who was General Counsel for 20 years at BYU. I just put those names in the record because they were all members of the Utah Bar.

Chairman SPECTER. Thank you very much, Senator Leahy.

Senator Hatch.

Senator HATCH. Mr. Griffith, as you know, statute interpretations vary according to the statute; is that correct?

Mr. GRIFFITH. That's correct.

Senator HATCH. I might interpret a statute differently from you; is that right?

Mr. GRIFFITH. I'm certain you would.

Senator HATCH. One member of the bar might interpret a statute differently from other members of the bar; is that correct?

Mr. GRIFFITH. That's correct.

Senator HATCH. Matter of fact, as I understand it, five presidents of the bar said that you did not practice law in an unauthorized fashion in the State of utah.

Mr. GRIFFITH. That's my understanding. I've seen that letter.

Senator HATCH. I have too, a number of whom were Democrats. I might add that is Brigham Young University purely a Utah institution?

Mr. GRIFFITH. No. Brigham Young University is among the largest private universities in the Nation. I believe it's the largest private religious university in the Nation. We have campuses throughout the world, quite literally. We have a presence in Israel. We have a presence in England. We have presence in many of the United States. Washington, D.C. we have a campus; in Illinois we have a campus. Until last year we had a campus in Hawaii that reported directly to the campus where I'm located in Provo. And then we have students—we have one of the largest international travel study programs in the world, so on any given day, we have students quite literally all over the world. So it's a very large international presence.

Senator HATCH. I take you did not go and take the bar examinations in any of those areas either?

Mr. GRIFFITH. I did not.

Senator HATCH. In other words, BYU is an international institution, as well as an institution within the State of Utah?

Mr. GRIFFITH. That's correct, Senator.

Senator HATCH. The bulk of its students are in the State of Utah?

Mr. GRIFFITH. Yes. The campus in Provo has about 30,000 students.

Senator HATCH. But there are thousands of others outside of Utah?

Mr. GRIFFITH. That's correct.

Senator HATCH. And approximately half of the students in Utah come from other States; is that correct?

Mr. GRIFFITH. I believe that's right. I haven't seen those numbers lately, but our student body comes from all 50 States and around the world.

Senator HATCH. When you said you practiced law in Utah, what did you mean by that?

Mr. GRIFFITH. Well, the title of my position is Assistant to the President and General Counsel, and as General Counsel I supervise an office of four other attorneys, and we represent—

Senator HATCH. And what bar do they belong to?

Mr. GRIFFITH. They belong to the Utah Bar.

Senator HATCH. In other words, all four of those attorneys belong to the Utah bar?

Mr. GRIFFITH. That's correct.

Senator HATCH. Did you ever make a decision that really affected purely Utah law without the advice and help of those four attorneys?

Mr. GRIFFITH. No, sir, I've never done that.

Senator HATCH. Did you ever try to practice in Utah without the advice or help of those attorneys or even with their advice or help?

Mr. GRIFFITH. No. I've always included them in collaborative analysis.

Senator HATCH. Whenever a Utah issue came up, did you try and handle it personally or did you have the Utah lawyers have it?

Mr. GRIFFITH. Had the Utah lawyers handle it. Very little of what I do on a day-in and day-out basis involves Utah law.

Senator HATCH. Then it is true that your job is to basically function as an overall wise lawyer to give advice to the president of the university.

Mr. GRIFFITH. That's part of my responsibility. My responsibility is also broader than that. Most of what I do is lawyering, but a good deal of what I do is act as a university administrator in a number of capacities.

Senator HATCH. Were you born and raised in Utah?

Mr. GRIFFITH. Excuse me?

Senator HATCH. Were you born and raised in Utah?

Mr. GRIFFITH. No. I was born in Yokohama Japan, and was raised in McLean, Virginia.

Senator HATCH. Have you ever been in Utah other than the time that you have been there at the Brigham Young University?

Mr. GRIFFITH. When I was studying there as an undergraduate, but even then I was a resident of Virginia, but I've become a resident of Utah since August of 2000.

Senator HATCH. Did you intend to stay there the rest of your life at the Brigham Young University, assuming that you had not been asked to be a Federal judge?

Mr. GRIFFITH. You know, Senator, I hadn't thought that far ahead. My life has been done in about four- or 5-year increments. If I were, there's no question that I—as I've stated in my written, answers to the written questions, that I intend to become a member of the Utah Bar if I stay in Utah.

Senator HATCH. As I understand it, you did not expect to become a member of the Utah Bar because you did not expect that your whole lifetime would be spent in Utah.

Mr. GRIFFITH. Yeah. Well, the primary reason I haven't become a Utah Bar is I don't need to become a member of the Utah to practice—to carry out my responsibilities at the university. Were I to stay in Utah I would be interested in joining the Utah Bar. I believe in bar associations. I believe in the good that they can do, and I would like to participate and be helpful in that way. But that's a different question of whether it's necessary to do so to carry out my responsibilities at the university.

Senator HATCH. Mr. Chairman, my time is up, but let me just read from the letter of the five members of the Utah Bar. I will just read part of it. "While there is no formal 'general counsel' exception

to the requirement that Utah lawyers must be members of the Utah bar, it has been our experience that a general counsel working in the State of Utah need not be a member of the Utah bar provided that when giving legal advice to his or her employer that he or she does so in conjunction with an associated attorney who is an active member of the Utah bar and that said general counsel makes no Utah court appearances and signs no Utah pleadings, motions or briefs."

You are familiar with that?

Mr. GRIFFITH. I am, Senator.

Senator HATCH. And you never did any of those things?

Mr. GRIFFITH. That describes precisely how I've organized my affairs since arriving in Utah in August of 2000.

Senator HATCH. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Hatch.

Senator Feingold.

Senator FEINGOLD. Thank you, Mr. Chairman.

Senator LEAHY. Is that the same letter where they say they do not opine whether he lives up to the standard?

Senator HATCH. Well, I do not think they could, because they did not follow every movement. But the fact is that the five bar association members have been astounded that anybody would raise this.

Senator LEAHY. You do not have to be defensive. I am just asking.

Senator HATCH. I am defensive about it.

Senator LEAHY. Can we put the letter in the record, Mr. Chairman?

Senator HATCH. I will. I will put it in the record.

Chairman SPECTER. And still it is Senator Feingold.

Senator FEINGOLD. Thank you, Mr. Chairman.

Mr. Griffith, welcome to the Committee.

Mr. GRIFFITH. Thank you, Senator.

Senator FEINGOLD. Your nomination to the D.C. Circuit has been and remains quite controversial. Perhaps most significantly it appears that you failed to follow the rules of two different bar organizations. Unfortunately, the timing of your hearing last fall left many member, including myself, without a meaningful opportunity to question you. And instead I provided you with a number of written questions, and I was hoping to have a chance now to clarify several of your responses concerning this same issue, the practice of law in Utah without a law license.

As has become clear through this nomination process, you have not been a member of the Utah Bar since you became general counsel at BYU in 2000. However, you received strongly-worded guidance from the general counsel of the Utah State Bar directing you to take the Utah Bar examination. In a May 14th, 2003 letter, Katherine Fox, general counsel, Utah State Bar, told you that Utah does not and has never had a "general counsel" exception to its licensing requirements. She wrote that it was both "unfortunate" that you had delayed taking the Utah Bar and suggested steps you could take to act as general counsel until you took the Utah Bar exam. The letter stated, "Towards that end it would be a prudent course of action to limit your work to those activities which would

not constitute the practice of law." She continued, "If such activities are unavoidable, I strongly urge you to closely associate with someone who is actually licensed here and on active status." Finally she ended her letter by warning you that applicants have been denied admission to the bar for issues regarding the unauthorized practice of law.

In light of Ms. Fox's letter, I was surprised to learn that you took no steps whatsoever to document you complied with her advice. Would you explain to this Committee why you took no steps to document your work in a manner that would allow you to explain to the Utah bar that your arrangements did not constitute practicing law without a license?

Mr. GRIFFITH. Thank you, Senator. I believe the answer that I gave to that, that I took no steps to document it because the end of the answer is every person in my office and every person that I deal with at the university knows how I do things, and I do things in close collaboration with other attorneys. Any of the lawyers in my office can attest to that.

I believe another related question was what do you do to make certain you can comply with that? And I think I've answered that, at least in part. The other is I collaborate with my colleagues in my office. There isn't a single legal matter on which I have been involved since I've arrived at the university that has not involved a collaborative effort with one of the other members of the Utah bar.

Senator FEINGOLD. It would be my thought if a letter like that came in that documentation would be a good idea. But let me turn to this. In response to my written questions, you wrote that you did not recall telling any outside counsel you worked with during your tenure at BYU that you were not a member of the Utah bar. However, the Utah code states that you may not practice law or assume to act or represent yourself as a person qualified to practice law within the State if you are not licensed to practice within the State. Did you ever inform outside counsel for BYU, opposing counsel or employees that you advised that you were not admitted to practice law in Utah and that you could do only legal work in a very limited—you could only do legal work in a very limited manner?

Mr. GRIFFITH. I don't recall whether I had discussions with our outside counsel. They're certainly aware of it now. But all of the lawyers in my office were aware of it, the president of the university was aware of it. At the time the university posted its notice of a job vacancy as general counsel, the conscious decision was made that the general counsel need not be a member of the Utah bar. The president of the university was well aware of that. He and I, both presidents under whom I've served, have discussed this. I make those who I work with at the university aware of that. And the way I practice law is to always be involved with another member of the office.

Senator FEINGOLD. I hear your answer with regard to the university and the general information, but my question was did you ever inform outside counsel for BYU, opposing counsel or employees that you were not admitted to practice law in Utah, and I take your answer as no, because you do not recall any example of—

Mr. GRIFFITH. I don't recall having a specific discussion with outside counsel, but I do know that all of the outside counsel that I listed in the answer is aware of that. They know that.

Now, with regard to—you also asked about opposing counsel. I don't recall any instance where I told opposing counsel that. Now, the nature of my practice is very rarely am I involved with opposing counsel. My responsibilities are largely advising the university president we have lawyers in our office who take the laboring oar on transactional work with those outside the university and with litigation matters. And to be sure I supervise them, and on occasion I have dealt with opposing counsel, but that's not something that happens with great frequency.

Senator FEINGOLD. Thank you. I seem my time is up, but it is very clear from the answer that I asked repeatedly did the nominee ever inform—

Chairman SPECTER. Senator Feingold, if you need some more time, go ahead.

Senator FEINGOLD. I just want to comment quickly. That did the nominee ever inform anyone of the fact that he was not admitted to the bar, his response has consistently been they somehow knew. That was not the question, and that is not the obligation in my view based on his status as a person not admitted to the Utah bar.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Feingold.

Senator Leahy has advised that he may submit some questions for the record.

Senator LEAHY. I will submit mine for the record.

Chairman SPECTER. Anybody else have any questions?

Senator HATCH. Could I just add this little bit to this? I think it is important. The ABA has reviewed all of this and has rated you qualified. Monroe Friedman, who is considered a recognized expert on legal ethics, has expressed his opinion that your actions were appropriate under the circumstances. Among other things Professor Friedman noted that, "In Utah Mr. Griffith's bar status was known to Brigham Young University, the only client for whom he did work as a lawyer. His legal work there was always in association with one or more members of the Utah bar, and he has never appeared in court." So he found that.

And then finally, let me just close, Mr. Chairman, with a letter which I will put in the record from Abner J. Mikva, who of course is one of our former colleagues in the House of Representatives, and who was on this very Circuit Court of Appeals. I will just read part of it. "Tom Griffith will be a very good judge. I have worked with him indirectly while he was counsel to the Senate and more directly as a major supporter of CEELI, the Central and Eastern European Law Initiative of the American Bar Association. Tom was an active member of CEELI's advisory board, and he and I participated in many prospects and missions on behalf of CEELI. I have always found Tom to be diligent, thoughtful and of the greatest integrity. I think that the bar admission problems that have been raised about him do not reflect on his integrity. Rather, they appear to be understandable mistakes and negligence which cannot be raised to the level of ethical behavior. Tom has a good tempera-

ment for the bench, is moderate in his views and worthy of confirmation." So I just put that in the record.

And just one last question. During your whole time at Brigham Young University you always had the advice of those four Utah lawyers on every Utah issue?

Mr. GRIFFITH. Not just on every—yes, on every Utah issue and on every legal issue that I was involved with.

Senator HATCH. Thank you, Mr. Chairman. That is all I have.

Senator LEAHY. Mr. Chairman, if I might, and I am sure this was simply an oversight on the part of Senator Hatch when he spoke of the bar association finding of qualified. Actually, they did not all find you qualified. Some found you not qualified. Why do you think that some in the bar association, the ABA, when they made the listing on you, why do you think there were some who found you not qualified? Do you think it is because you were not a member of the bar, or do you think they had another reason?

Mr. GRIFFITH. Senator Leahy, I have no idea. All I know is the letter that was sent to the Committee finding that a majority found me qualified. I don't know the reason for it.

Senator LEAHY. I understand, and the majority did, minority found you not qualified. Did they give—in their questioning of you did you get any indication that the not-qualified—because you have had quite a background as a lawyer. Did you get the indication that the not qualified referred to your failure to be a member of the bar or they had some other reason?

Mr. GRIFFITH. Senator, I don't know the reason for it.

Senator LEAHY. The other four lawyers in your office, were they required to be members of the Utah bar? I know they are members of the Utah bar. By your interpretation are they required to be members of the Utah bar?

Mr. GRIFFITH. They would not need to be. We'd need to have some who are, but as in-house counsel in Utah, they would not need to be members of the Utah bar provided they were closely associated with some who were.

Senator LEAHY. There are five of you there. Are you saying all five could be non-members of the Utah bar provided—

Mr. GRIFFITH. Oh, no.

Senator LEAHY. Provided when they actually did something, somebody who was a member of the Utah bar walked in and gave their imprimatur to it?

Mr. GRIFFITH. No. No, I'm sorry if I gave that impression. I didn't mean to give that impression. With the five lawyers in our office, it's my understanding of the interpretation of the Utah bar that provided that they are closely associated with members of the Utah bar—and the way I understand that would be that we have Utah lawyers in our office working on all those matters.

Senator LEAHY. How many of the five then would have to be?

Mr. GRIFFITH. You know, I haven't thought about that, Senator.

Senator LEAHY. Why do you not think about it and let us know?

Mr. GRIFFITH. Okay, I will.

Senator LEAHY. Thank you.

Senator HATCH. Mr. Chairman, if I could just add one thing. I am a member of the Utah bar. I do know that the five presidents were right, and you had advice. And I do know the integrity of Tom

Griffith, and I personally resent anybody who takes your integrity and smashes it or tries to. So all I want to say is that you have stated it correctly. Abner Mikva stated it correctly. Monroe Friedman stated it correctly. And frankly, BYU is an international institution, and there was no requisite for you to have to take the bars in all the States in which it does business, nor would there be of any corporate general counsel. And Utah is not so far behind that the corporate general counsel will have to take the bar in Utah. It is strictly up to the individual.

And so I just hope everybody will take all that into consideration and allow this good man to serve because I know he will be a very good judge on that particular bench. With that I will close.

Chairman SPECTER. We will keep the record open for one week. It will close 6:00 o'clock on Tuesday, March 15th.

Just one final note, Mr. Griffith, with some risk on prolonging this. I note that you participated in a successful effort to save a Virginia death row inmate who was serving a life sentence for a 1981 murder of a woman in suburban D.C., and sentenced to death for the 1985 murder of a fellow inmate. That is a little different dimension to your professional background generally. How did you happen to undertake that kind of a case?

Mr. GRIFFITH. I was an associate at my law firm, and I believe strongly in the need for lawyers to be involved in pro bono projects, and so I was quite interested in that one. I believe strongly that lawyers have a duty and an obligation because we have been so blessed and we're so fortunate in this country, that lawyers have a duty and an obligation to help out those who are far less advantaged, to those who have been left out and left behind. And so when the project came along, I expressed great interest in it, and then particularly when I got into the facts of it and was convinced that here was a man who had been unjustly accused of what he was doing, it moved beyond duty there—

Chairman SPECTER. Unjustly accused, you thought he was innocent?

Mr. GRIFFITH. I believe he was actually innocent.

Senator LEAHY. Mr. Chairman, one of the reasons I asked Mr. Griffith about his pro bono work, he does have an impressive background in that. I totally agree with him that lawyers should do that. We are a privileged class. The law firm I first served in, a crusty curmudgeon was general counsel and told everybody we had better be doing pro bono work, and he insisted on it, and he made it possible for some of us young lawyers who could not have afforded to do it on our own, he made it possible that he would do it. I totally agree. I find it very difficult to support nominees for anything who have been lawyers who have not done pro bono. I know all of us have and I think it is important.

Chairman SPECTER. Thank you, Senator Leahy.

I thought it was an interesting aspect of your professional record. You are reputed to be firmly ensconced on one status of the political spectrum—I think frequently we overdo that—and to have you go in for a man convicted of two first degree murders, that is an unusual line, especially for you to come to the conclusion that the defendant was innocent.

That concludes the hearing. Thank you all very much.

Mr. GRIFFITH. Thank you.
[Whereupon, at 10:44 a.m., the Committee was adjourned.]
[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Responses of Thomas B. Griffith
Nominee for the U.S. Court of Appeals for the District of Columbia
To the Written Questions of Senator Russell D. Feingold

1. **At your hearing on March 8, 2005, I asked whether "you ever inform[ed] outside c unsel for BYU, opposing counsel, or employees that you advised, that you were not admitted to practice law in Utah, and that you could only do legal work in a very limited manner." You have stated that you advised counsel in your office, and the President of BYU, of your status. However, you did not answer the question with regard to other BYU employees who you have advised.**

Did you inform employees to whom you provided legal advice that you were not admitted to practice law in Utah, and that you could only do legal work in a very limited manner?

Response: I have informed employees at BYU to whom I have provided legal advice that I am not a member of the Utah Bar and that I am a member of the Bar of the District of Columbia. I have arranged my office in such a manner that my legal work is not limited. On each occasion when I have provided legal advice to employees at BYU I have done so in close association with the members of my office who are members of the Utah Bar or with outside counsel who are members of the Utah Bar.

2. **In my earlier written questions, I asked you whether, in your capacity as General Counsel, you had attorneys in your office appear with you in person at every meeting or participate in every phone call during which legal advice was dispensed. You said "[n]o," and stated that "it has never been [your] understanding that their physical presence was required."**

How did you reach the understanding that a licensed attorney was not required to be present for meetings and phone calls during which you, an unlicensed attorney, were dispensing legal advice? Did you contact a representative of the Utah Bar Association and ask for direction? Did you consult the Utah Code?

Response: My understanding is based upon the concept expressed in the letters to the Committee by the current Executive Director of the Utah Bar that in-house counsel should "directly associate with lawyers who are licensed in the state and on active status" and by five past presidents of the Utah Bar that in-house counsel should give "legal advice to his or her employer . . . in conjunction with an associated attorney who is an active member of the Utah bar." My practice is to have a member of my office or outside counsel physically present when giving legal advice. On the few occasions when that has not been possible, I have been careful to make certain that my advice is the result of collaboration with a lawyer from my office or outside counsel. I did not contact a representative of the Utah Bar to ask for direction nor do I remember consulting the Utah Code about this.

3. Nearly three years after becoming General Counsel to BYU, on April 10, 2003, you wrote a letter to the President of the Utah Bar Association, informing him that you had been t ld by your predecessor at BYU that there was a General Counsel exception that exempted you from the requirement of being admitted to the Utah bar. You also wrote in that letter: "Subsequent conversations with people in your office as well as discussions with other general counsel around the state confirmed that understanding."

In my first set of written questions, I asked you to name persons at the Utah Bar Association whom you spoke to prior to 2003 about the General Counsel exemption, and you stated that you "[did] not recall any such conversations."

You apparently spoke with your predecessor about your ability to act as General Counsel without joining the Utah Bar, but it is the Utah State Bar that is responsible for interpretation of the rules regarding the practice of law. Please explain why for almost three years you did not contact the Utah State Bar to confirm this interpretation, during which time you practiced in the state without a Utah law license?

Response: I was satisfied, based on my prior understanding of the practice of in-house counsel and my conversations with other attorneys once I moved to Utah, that in-house counsel in Utah need not be licensed in Utah provided that he or she was closely associated with Utah lawyers, made no court appearances, and signed no Utah pleadings, motions, or briefs. This is consistent with the letters to the Committee on this matter by five past presidents of the Utah Bar, and its current executive director.

4. Mr. Griffith, in November 2003 you applied to take the Utah Bar exam, although you did not actually take the exam. Question 52 of the Utah State Bar Application asks if the applicant has "ever been disbarred, suspended, censured, sanctioned, disciplined or otherwise reprimanded or disqualified, whether publicly or privately, as an attorney." In your application, you stated that your law license had never been suspended, and that you had practiced law in Utah as a member of the D.C. Bar.

(a) Were you, in fact, suspended from the D.C. Bar at any time? For what period of time?

Response: It is my understanding that I was administratively suspended by the D.C. Bar from November 1998 until November 2001 for the inadvertent failure to pay my Bar dues.

(b) Do you agree that it would have been difficult to rely on your suspended D.C. Bar membership to practice law in Utah during 2000 and 2001?

Response: No, because had I known that I had been administratively suspended for the inadvertent failure to pay my D.C. Bar dues, I would have immediately paid and my status would have been restored. That is precisely what happened when I first learned in October 2001 that my D.C. Bar dues had not been paid. Upon paying the dues, my status was immediately restored

(c) Would you respond to Question 52 on the Bar Application the same way today?

Response: No. When answering the question at the time, the thought did not occur to me that I was being asked information to which administrative suspension for an inadvertent failure to pay bar dues would have been responsive. Rather, I read the question as calling for information whether the applicant had ever been sanctioned for misconduct by a disciplinary authority, which I have never been. Given the concern that has been expressed about my answer and out of an abundance of caution, were I to fill out the application today, I would explain the lapse in my membership just as I did in response to Question 11 on my Senate Judiciary Committee Questionnaire when I was asked whether my bar membership had ever lapsed.

5. As you know, under existing Department of Education regulations, schools can use any one of three tests to demonstrate their compliance with Title IX. As a member of Secretary Paige's Commission on Opportunity in Athletics, you were an outspoken critic of one of these three tests, the substantial proportionality test. As I understand it, you pushed the Commission to recommend complete elimination of the substantial proportionality test because it is a "quota system." The Commission rejected your proposal.

In response to my first set of written questions, you stated that your concerns were limited to those instances in which educators misused the substantial proportionality test to create a quota system. Yet every federal Court of Appeals to consider this issue has found that the three-part test is legally valid, and that the proportionality prong does not impose quotas. In contrast to what your statements suggest, schools have a great deal of flexibility in determining how to structure their sports programs to satisfy Title IX.

(a) If your concerns were limited to the *misuse* of the substantial proportionality test, why did you recommend eliminating it entirely?

Response: After the Commission heard testimony that some had misused the concept of substantial proportionality and turned it, in some instances, into a quota system, I was concerned that there was an inherent risk of such misuse. I supported three recommendations, each of which addressed the problems presented to the Commission regarding the misuse of substantial proportionality: 1) a clarification of substantial proportionality "to allow for a reasonable variance in the relative ratio of athletic participation of men and women while adhering to the non-discriminatory tenets of Title IX," which received the unanimous support of the Commission; 2) the abandonment of substantial proportionality as the lone "safe-harbor" in "favor of a way of demonstrating compliance with Title IX's participation requirement that treats each part of the [three-part] test equally," a recommendation that also received unanimous support by the Commission; and 3) the elimination of the use of numeric formulas to determine compliance with Title IX, which I sponsored because I thought it important that the Commission be on record with regard to this issue.

(b) Do you disagree with other courts' analysis upholding the legality of the substantial proportionality test? How can we be sure that, as an appellate judge, you w uld not prejudge this issue?

Response:

As a policy adviser to the Department of Education, I was critical of the decisions of the eight federal appeals courts that have upheld the proportionality test. My criticism of the eight appellate courts that had affirmed the use of substantial proportionality was a response to those who argued that the courts' decisions required the use of substantial proportionality. I pointed out that the fact that these courts found the use of substantial proportionality permissible using *Chevron* deference did not mean that substantial proportionality was required by Title IX, and that the Commission was free to recommend other means to expand opportunities for women. I was trying to make the point that even if substantial proportionality is a permissible means, it is not a required means. If confirmed, my role as a federal appeals court judge would be to follow the law regardless of my personal preferences. As an appeals court judge in the D.C. Circuit, my commitment would include following the precedent declared by the United States Supreme Court and the D.C. Circuit. As a judge, I would put my prior views, expressed as a policy adviser, aside, and I would look at the issue anew in keeping with my duty to apply the law impartially in accordance with the precedents of the Supreme Court and the D.C. Circuit, in light of the facts of the particular dispute to be adjudicated, and with the benefit of the arguments of counsel.

Responses of Thomas B. Griffith
Nominee for the U.S. Court of Appeals for the District of Columbia
to the Written Questions of Senator Dianne Feinstein

Question #1: **Is there any new information, that we do not have now, that you think we should know? This is an opportunity for you to teach us more about you.**

Response: I thank you for this opportunity. I was first attracted to the study and the practice of law because I was convinced that the law can be a powerful engine for good in society. I am even more convinced of that proposition today after many years in the practice of law in a variety of settings. Following my freshman year of college, I spent two years of my life in South Africa and Zimbabwe at a time when Nelson Mandela was in jail, apartheid reigned, and Ian Smith was still in power. That experience transformed my life in many ways. I came back from southern Africa with a deeper admiration than I had ever had for the United States Constitution and a realization that the freedoms we enjoy are fragile unless men and women of good will and dedication work to defend them. Our freedoms must be constantly protected. Despite the current fashionable criticisms directed at lawyers, I believe that the practice of law, properly understood, is among the highest and best uses of human talent. The practice of law can do much to create in our Nation a sense of community that recognizes the fundamental worth of each individual. I have practiced law that way. I believe that the letters the Committee has received from prominent attorneys, both Democrat and Republican, and others who have known my life and my work as a lawyer confirm that.

During my years as Senate Legal Counsel, in the midst of a highly partisan atmosphere, I demonstrated to the Senate, its members, employees and those outside the Senate that I take seriously an oath of office. With the help of a remarkable group of lawyers, I provided the Senate with sound judgment in trying times, and I did so with fairness and objectivity. I first met many of the prominent Democratic attorneys who have written the Committee on my behalf during that time. They saw that my respect for the law was what defined my conduct. During my most recent hearing, I was asked about my pro bono work when I was in private practice. I appreciated the opportunity to discuss my pro bono representation of a death-row inmate. There are at least two reasons why I was involved in that project. First, we lawyers have been the beneficiaries of this remarkable society that has been created because of the rule of law. We should do all that we can to make certain that those who have not been as fortunate, who have been left out and left behind, are given the full advantage of the rule of law. Second, as I became involved in this particular representation, I became convinced that the man we were representing was actually innocent of the crime for which he was accused. At that point, my involvement became more than playing a part – even an important part – in a vital process. Now, the purpose of my involvement was to use the rule of law to prevent a gross injustice. And we succeeded. There are few experiences in my life as gratifying as learning that the Governor of Virginia determined to commute our client's death sentence. This passion

for the rule of law is not unique to me but it helps explain how I practice law and what I do.

For the last ten years, I have been deeply involved in the American Bar Association's Central European and Eurasian Law Initiative (ABA/CEELI). I am a member of ABA/CEELI's national advisory board. ABA/CEELI sends American judges and lawyers to former communist countries on a pro bono basis to work with native lawyers, judges, and reform-minded government officials to help establish the rule of law. As I have traveled through these former communist countries, I have had the opportunity to meet with European and Eurasian lawyers who look to the United States as the great exemplar of a nation that is dedicated to the rule of law, limited government, and individual liberty. Their admiration for what we have accomplished is gratifying, but it is also challenging. Many of these lawyers and judges quite literally have put their own lives at risk to advance the rule of law in their countries. These lawyers and judges are a constant reminder to me of the power of the idea of the rule of law. It benefits nations and societies because it recognizes the value of the individual.

During my legal career and as a public servant, I have demonstrated my commitment to protecting individual rights. If I am fortunate enough to be confirmed, I will continue to do so. You may recall from the time we visited in your office last summer, I am deeply committed to Title IX in particular and to expanding and advancing opportunities for women in all areas of our society. I am committed to that because it is the right thing to do. But it is also personal for me. I am the father of five daughters and a son. My entire adult life, I have been an outspoken advocate for expanding opportunities for women in part because it means more opportunities for my daughters and a better society for my son. Those who know me best know that about me. Some of them have written to the Committee about that passion of mine.

Those who have worked with me throughout my career know the value I place on candor and honesty. They know as a litigator and adviser that I do not cut corners with the truth and that I always work within the rules. Similarly, I have been candid and forthcoming regarding the bar issues, to the best as my recollection would permit. I have acknowledged that I am responsible for the failure to pay my D.C. Bar dues in a timely fashion. I mistakenly relied on the D.C. Bar to provide me notice and my law firm to make certain that my dues had been paid. I no longer rely on others to discharge my duty in this regard. With respect to the Utah Bar issue, I have been careful to carry out my responsibilities as Assistant to the President and General Counsel at Brigham Young University consistent with the longstanding practice of the Utah Bar, expressed in letters to the Committee by five past presidents of the Bar, its current executive director, and others, that in-house counsel need not be locally licensed provided that he or she is closely associated with Utah lawyers, as I have been

Throughout my career, I have used my legal training and my positions to build bridges across partisan, social, cultural, and racial divides. That commitment is reflected in the bi-partisan support I enjoy in the legal community.

Thank you for this opportunity to explain more about who I am and what motivates my commitment to the law.

Question #2: **You stated at your hearing that you have no plans to take the Utah Bar Exam. But in a May 14, 2003 letter, the General Counsel of the Utah Bar Ass ciation wrote to you: "I would encourage you to start preparing your application as soon as possible" to take the Utah Bar Exam. Why have you decided not to follow her advice?**

Response: It has been my understanding that the consistent advice of the Utah Bar over the years is that in-house counsel need not become a member of the Utah Bar provided he or she is closely associated with Utah counsel, makes no court appearances, and signs no Utah pleadings, motions, or briefs. This was confirmed in letters to the Committee from the current executive director and five past presidents of the Utah Bar. I have always adhered to this advice. Were I to remain in Utah as Assistant to the President and General Counsel at Brigham Young University, I would seek to join the Utah Bar, not because I believe it is necessary for me to do so under the rules, but because I would want to.

Background: **You have expressed support for Title IX. Indeed, Title IX, since its adoption in 1972, has led to a five-fold increase of intercollegiate women athletes in America, from 32,000 to 150,000 today. But you have made some arguably conflicting statements about your views on federal funding of women student athletes.**

- **On the Committee to review Title IX that you served on, you stated that numeric formulas "are morally wrong and logically flawed."**

- **But regarding your work on that committee, you said in a written answer to Senator Kennedy last year that you opposed numeric formulas because you had heard that schools have misused a test to have opportunities for women athletes be proportional to the number of women students (the Title IX "proportionality test").**

Question #3: **How common were these problems you mentioned, in which schools misused Title IX?**

Response: It is my recollection that the Commission heard from a number of college and university administrators who testified that the substantial proportionality concept had been used as a quota.

Question #4: **Can you please discuss some of the examples that you were referring to, in which schools misused Title IX or the proportionality test?**

Response: I cannot recall specific instances now and do not have access to the testimony.

Question #5: **If those problems were common, instead of recommending that the "pr portionality test" be revoked, did you instead consider recommending that schools be better educated on how to use Title IX and the proportionality test pr perly?**

Response: Yes, and I supported recommendations to that effect. In particular, I supported recommendations that: 1) called for the Department of Education to "provide clear, consistent, and understandable written guidelines for implementation of Title IX and make every effort to ensure that the guidelines are understood through a national education effort [and] ensure that enforcement of and education about Title IX is consistent across all regional offices"; 2) the Department of Education "should clarify the meaning of proportionality to allow for a reasonable variance in the relative ratio of athletic participation of men and women while adhering to the nondiscriminatory tenets of Title IX"; and 3) the Department of Education should not designate substantial proportionality as the sole "safe harbor," but should find a "way of demonstrating compliance with Title IX's participation requirement that treats each part of the [three-part] test equally."

April 4, 2005

The Honorable Arlen Specter
United States Senate
Chairman, Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

RE: Response of Thomas B. Griffith, Nominee for the U.S. Court of Appeals for the District of Columbia Circuit to the Written Follow-up Question of Senator Dianne Feinstein

Dear Senator Specter:

I have attached my answer to the latest written follow-up question to me from Senator Feinstein.

Sincerely,

Thomas B. Griffith

kk

cc: The Honorable Patrick J. Leahy
United States Senate
Ranking Member, Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C. 20510

United States Department of Justice
Office of Legal Policy

Response of Thomas B. Griffith
Nominee for the U.S. Court of Appeals for the District of Columbia Circuit
to the Written Follow-up Question of Senator Dianne Feinstein

Question #1: Your answer to one of my questions concerns me. I asked you to "please discuss some of the examples that you were referring to, in which schools misused Title IX or the proportionality test." You responded: "I cannot recall specific instances now and do not have access to the testimony."

As you are certainly aware, the Commission's testimony is available on the Internet, at http://www.ed.gov/about/bdscomm/list/athletics/transcripts.html. Therefore, I do not understand why you said that you do not have access to the testimony.

To be clear, I am asking for *your own understanding* of what constituted "misuse" by schools of Title IX or of the proportionality test. You wrote to Senator Kennedy last year that: "I came to the belief that substantial proportionality should not be used to pursue the worthy objective of expanding opportunities for women in intercollegiate athletics because of the inherent risk that it will be misused by some as a quota system. The Commission heard testimony that *some had misused the concept of substantial proportionality* and turned it, in some instances, into a quota system." (Emphasis added.) In light of that statement, what I would like you to communicate to me is your own understanding of what constituted "misuse;" please feel free to review the transcript to refresh your memory.

Response: Thank you for this opportunity to address your concerns. At the time I responded to your previous questions, I was not aware that the transcripts of the hearings of the Secretary of Education's Commission on Opportunity in Athletics were available online. Following your suggestion, I have reviewed those transcripts to refresh my memory.

When the Commission began its work in the summer of 2002, it did so against the background of complaints by some, including representatives of a number of men's collegiate athletic teams and their supporters, that the Department of Education's use of substantial proportionality to enforce compliance with Title IX was unfair and contradicted the express language of Title IX that prohibits "preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the . . . percentage of persons of that sex

participating in . . . the . . . activity." 20 U.S.C. 1681(b) (2000); Education Amendments 1972, Pub. L. No. 92-318, section 901, 86 Stat. 235, 373-374 (1972).

During town hall meetings in August, September, October, and November of 2002, the Commission heard numerous presentations from experts as well as members of the public to the effect that the concept of substantial proportionality has been misused by the Department of Education and colleges and universities. As I explained to my colleagues at the time, I believed that the chief mistake has been an overemphasis on substantial proportionality as the primary means of proving compliance with Title IX. This overemphasis distorts and undervalues the two other prongs of the three-part test the Department of Education created to determine compliance: demonstrating a history and continuing practice of program expansion for women or fully and effectively accommodating the interests and abilities of women.

The Commission heard from athletic directors, college and university presidents, legal counsel, and others who testified that many schools had adopted the approach that substantial proportionality alone was the way to achieve compliance with Title IX. There were at least two explanations for this approach presented to the Commission. First, by its very nature, substantial proportionality can be more easily measured than the other means of compliance. For that reason, it presents an easier and safer means to protect a risk-averse college or university from unwanted, time-consuming, and costly litigation or regulatory investigation. Second, the Department of Education announced in a policy interpretation in 1996 that achieving substantial proportionality would constitute a "safe harbor" from adverse regulatory scrutiny. The Commission heard testimony that, in response to this 1996 clarification letter, many universities determined that the most practical way to withstand that scrutiny or avoid it altogether was to pursue substantial proportionality. The Commission also heard testimony that the Department of Education itself, in some instances, demanded that universities and colleges pursue substantial proportionality to the exclusion of the other two prongs. Many complaints were heard by the Commission about the inflexibility of the Department of Education in its reliance on substantial proportionality and its refusal, in effect, to use the other two prongs.

The decision by the Department of Education to emphasize substantial proportionality as the preferred means of achieving compliance with Title IX and the understandable decision of administrators and university counsel to comply has led to the unfortunate practices of artificially capping athletic team size, euphemistically referred to as "roster management", and, in some instances, even cutting men's teams. I expressed the view that such practices are a misuse of Title

IX when they are used to achieve compliance with a numeric formula based on the sex of the athlete, and they do not expand opportunities for women athletes.

The Commission responded to this evidence of misuse of substantial proportionality in several of its Findings and Recommendations. For example, Finding 3 provides, "Many practitioners feel that their institutions must meet the proportionality test to ensure a 'safe harbor' and avoid expensive litigation." In its explanation for this Finding, the Commission wrote

> Witnesses and Commissioners stated on numerous occasions that attorneys and consultants have told them that the only safe way to demonstrate compliance with Title IX's participation requirement is to show that they meet the proportionality requirement of the three-part test. . . . It is true that many federal courts have emphasized the proportionality requirement in Title IX litigation. The facts of the *Cohen* case underscore the challenge institutions may face in meeting the evidentiary requirements of parts two and three of the three-part test, which are by their nature more subjective than part one. The court precedent reflects the decision by the Office for Civil Rights to identify only the first part of the three-part test as a "safe harbor" for demonstrating compliance with Title IX. This means that if a school can demonstrate proportionality, there will be no further scrutiny by the Office for Civil Rights. If a school claims it is in compliance under one of the other tests, the Office will scrutinize that claim more carefully since compliance under either of these parts is not a safe harbor. There should be an additional effort to designate parts two and three as safe harbors along with part one. For attorneys and consultants, the easily quantifiable nature of the proportionality test, requiring as it does simple data and a clear mathematical formula, may make it more likely to be favored as a means of establishing compliance. Finally, since the first part of the test is a safe harbor, if a school were to establish compliance under one of the other prongs it might still be subjected to a subsequent complaint based on its inability to demonstrate proportionality.

U. S. Department of Education, Secretary's Commission for Opportunity in Athletics, *Open To All: Title IX at 30*, 23, 24.

Likewise, in Finding 4, the Commission wrote,

> Although, in a strict sense, the proportionality part of the three-part test does not require opportunities for boys and men be limited, it has been a factor along with other factors, in the decision to cut or cap teams.

In its explanation for this Finding, the Commission wrote:

> The 1996 clarification letter advised education institutions that they may "choose to eliminate or cap teams as a way of complying with part one of the three-part test." Cutting teams or limiting the available places on teams is not a requirement for complying with Title IX. However, the Commission was told that when faced with a complaint regarding its athletics programs, an institution may feel that cutting a team or capping opportunities is an easy way to gain compliance.

Open To All: Title IX at 30, 24.

At least three of the Commission's unanimous recommendations addressed this misuse of substantial proportionality. Recommendation 5 provides,

> The Office for Civil Rights should make clear that cutting teams in order to demonstrate compliance with Title IX is a disfavored practice.

The Commission explained:

> The loss of teams described in the Commission's findings, and eloquently described by many of the people affected, has caused the Commission great concern. Although the Commission recognizes that the decision to drop a team is affected by many factors, it should be made clear to schools that it is not a favored way of complying with Title IX. The fundamental premise of Title IX is that decisions to limit opportunities should not be made on the basis of gender. Therefore, education institutions should pursue all other alternatives before cutting or capping any team when Title IX compliance is a factor in that decision. If indeed teams have to be cut, student athletes should be given justification and adequate notice.

Open to All: Title IX at 30, 35.

Recommendation 14 provides,

> If substantial proportionality is retained as a way of complying with Title IX, the Office for Civil Rights should clarify the meaning of substantial proportionality to allow for a reasonable variance in the relative ratio of athletic participation of men and women while adhering to the nondiscriminatory tenets of Title IX.

The Commission explained:

> The Commission has been told that the meaning of the term "substantial proportionality" in the first part of the three-part tests has been adjusted in practice to require "strict proportionality." This recommendation would clarify the meaning of "substantial proportionality."

Open To All: Title IX at 30, 38.

Recommendation 21 provides,

> The designation of one part of the three-part test as a "safe harbor" should be abandoned in favor of a way of demonstrating compliance with Title IX's participation requirement that treats each part of the test equally. In addition, the evaluation of compliance should include looking at all three parts of the test, in aggregate or in balance, as well as individually.

The Commission explained:

> Many who have testified before the Commission have complained that the emphasis of the Office for Civil Rights on encouraging compliance with the first part of the three-part test by designating it as a "safe harbor" is leading institutions to limit opportunities rather than expand them. This recommendation aims to allow schools to demonstrate compliance using the other parts of the test without having to be concerned about later complaints for non-compliance with the first part.

Open To All: Title IX at 30, 40.

Responses of Thomas B. Griffith
Nominee for the U.S. Court of Appeals for the District of Columbia
To the Written Questions of Senator Edward M. Kennedy

1. Mr. Griffith, as you know, Title IX – the landmark law barring sex discrimination in education, has made an enormous difference in the lives of girls and young women across the country, especially in sports opportunities. I'm troubled by your views on this important civil rights law.

As a member of the Commission on Opportunity in Athletics, appointed by Secretary of Education Rod Paige, you proposed to eliminate the laws "substantial proportionality" test, under which schools are required to offer athletic opportunities to male and female students in substantial proportion to their overall representation in the student body. It's an effective way to measure if schools are treating women's teams fairly. You yourself called your proposal "radical." It's accurate, and it explains why your proposal was rejected, by the Commission, and also by the Department of Education.

a. You've tried to justify your position by saying that the proportionality test violates the language and spirit of Title IX, and the Equal Protection Clause of the Constitution. You called it "illegal, unfair and wrong," and even called it "morally wrong." How can you ask to be confirmed as a federal judge when you oppose such a basic and successful and widely accepted part of our civil rights laws?

Response: These statements were made in my role as a policy adviser to the Department of Education. They were not directed at Title IX, which I support wholeheartedly. Nor were they directed at the concept of substantial proportionality. They were directed at the practice by some to take the concept of substantial proportionality and use it as a quota system. If confirmed, my duty as a judge would be to apply the law regardless of any policy preferences I might have once had.

b. You've said that you opposed the "substantial proportionality test" because you thought some had "misused" or "misinterpreted" it to create quotas. In answers to my previous written questions, you stated that you "came to believe that substantial proportionality should not be used to pursue the worthy objective of expanding opportunities for women in intercollegiate athletics because of the inherent risk that it will be misused by some as a quota system." You also stated that the Commission had heard testimony that some misused the test to impose quotas. Even if that were true, why throw the baby out with the bathwater? Why not have the Commission educate people about the way to apply the legal standard, rather than seeking to throw out the standard itself?

Response: I supported recommendations to do just that, to clarify that substantial proportionality allowed for reasonable variances in ratios of athletic participation between men and women, and to make certain that substantial proportionality was not the sole means by which compliance with Title IX could be determined. In particular, I supported recommendations that: 1) called for the Department of Education to "provide clear, consistent, and understandable written guidelines for implementation of Title IX and make every effort to ensure that the guidelines are understood through a national education effort [and] ensure that enforcement of and education about Title IX is consistent across all regional offices"; 2) the Department of Education "should clarify the meaning of proportionality to allow for a reasonable variance in the relative ratio of athletic participation of men and women while adhering to the nondiscriminatory tenets of Title IX"; and 3) the Department of Education should not designate substantial proportionality as the sole "safe harbor," but should find a "way of demonstrating compliance with Title IX's participation requirement that treats each part of the [three-part] test equally." These recommendations garnered the unanimous support of the Commission, and, as a policy matter, I am comfortable that the recommendations made would greatly reduce the inherent risk that substantial proportionality would lead to quotas.

c. You have stated that the "substantial proportionality" test has an "inherent risk that it will be misused by some as a quota system." Please explain in detail why you believe this is so. Can you assure the Committee that you will not seek to overturn the substantial proportionality test if you are confirmed?

Response: The Commission heard testimony from many university administrators that substantial proportionality was being used as a quota because it was an easier means to avoid adverse regulatory scrutiny than the other prongs of the three-part test. If I am confirmed, I would occupy a much different role than the one I filled as a policy adviser to the Department of Education. I would apply the law as found in statute, regulation, and according to the precedents of the Supreme Court and the D.C. Circuit regardless of any policy preferences I may have once had.

2. As a member of the Title IX Commission you stated that "the Department of Education never should have, nor should it now continue, any remedy that relies on numeric formulas. It is illegal, it is unfair and it is wrong." That's pretty strong language, and it has broad implications for a range of well-established civil rights laws.

a. In answers to my written question, you stated that you did not oppose all use of numerical measures to prove discrimination in Title VII cases. How

can you reconcile that response with your earlier statements that all numeric measures are illegal and even "morally wrong?"

Response: These quoted statements were made during a policy debate in my capacity as a policy adviser. The focus of my remarks was on the misuse of substantial proportionality as a quota system in the context of Title IX. The Commission did not discuss nor did I mean to comment upon the use of numeric formulas, by which I meant quotas, outside the context of Title IX.

b. Please explain in detail what you meant when you stated that numeric measures are "morally wrong," including specific examples of instances in which it was considered morally wrong.

Response: My intent was to criticize quotas as an unfair way to advance social policy and not to advocate that numeric measures should not be used to help determine whether a party has complied with the law. Title IX itself expressly allows for the use of statistical evidence to show that "an imbalance" exists in opportunities for men and women. It forbids, however, "any educational institution to grant preferential or disparate treatment to the members of one sex on account of [that] imbalance."

c. Why did you make such sweeping statements if you did not mean them?

Response: My statements were meant as a criticism of the way some had misused substantial proportionality by making of it a quota system.

3. Mr. Griffith, as you know, there are several questions about your failure to maintain your membership in the appropriate bar associations while practicing law in the District of Columbia and in Utah. You failed to keep up your membership for three consecutive years where you were practicing law in the District of Columbia. You're still not a member of the Utah bar, although you have served as chief attorney for Brigham Young University since 2000.

a. In May 2003, the Utah bar told you the only way to maintain your status as to take the bar exam. Even assuming that your failure to pay your bar association dues in D.C. was an oversight, and your failure to take the bar before May 2003 was a misunderstanding, why have you still failed to take the bar exam?

Response: It has been my understanding, consistent with the views expressed in letters to the Committee by the current executive director of the Utah Bar and five of its past presidents, that I do not need to become a member of the Utah Bar to carry out my responsibilities at the University, provided that, when I am engaged in the practice of law, I do so "in conjunction with an associated attorney who is an active member of the

Utah bar and that [I] make[ ] no court appearances and sign[ ] no Utah pleadings, motions, or briefs." That describes precisely how I have organized my legal work at the University.

b. Do you agree that the failure to comply with bar rules in the jurisdiction in which one practices law is a serious matter for any attorney, particularly one who is nominated for the second highest court in the nation?

Response: Yes.

c. Your testimony at the recent hearing on your nomination makes clear that you do not plan to take the Utah bar exam. After you received the May 2003 letter from the General Counsel for the Utah bar instructing you to prepare to take the Utah bar exam "as soon as possible," did you ever contact the General Counsel again to inform the bar that you had decided never to take the exam? If not, please explain why you decided not to do so. If you did inform the General Counsel of this fact, please state when you did so.

Response: I did not contact the General Counsel again. As I explained above, I have arranged the work of my office consistent with the advice of the Utah Bar, which has been set forth in letters to the Committee from the current Executive Director and five of its past Presidents. If I remain as Assistant to the President and General Counsel at the University, I fully intend to become a member of the Utah Bar even though that is not necessary to carry out my responsibilities at the University.

4. In 2003, you submitted an application for admission to the Utah bar, although you never completed the process for admission. You stated in your application that you had never been disbarred, suspended, censured, sanctioned, disciplined or therwise reprimanded or disqualified, whether publicly or privately, as an attorney. However, in 2004, you informed the Committee that you were suspended from the D.C. bar in 1997 and 1998, although you continued to practice law in D.C. during that time.

a. Do you now acknowledge that your statement that you had not been suspended was incorrect?

Response: At the time, I had no thought that the form was asking a question that would cover the lapse of my membership for an inadvertent failure to pay my bar dues. Rather, I read the question as calling for discipline for misconduct, not a purely administrative sanction. Given the concern that has been expressed about my answer and out of an abundance of caution, were I to fill out the same application today, I would answer "Yes"

and explain the lapse in my membership just as I did in response to Question 11 on my Senate Judiciary Committee Questionnaire where I was asked whether my bar membership had ever lapsed.

b. At any time before that information was made public in the press, did you ever inform the Utah Bar that your membership in the D.C. bar had been suspended? If not, please explain why you failed to do so. If so, please describe in detail how you communicated that fact to the D.C. Bar. If the communication was in writing, please provide a copy to the Committee.

Response: No. I did not think that there was any need to do so. Immediately upon discovering the lapse, I paid my dues and was reinstated as a member in good standing.

5. If you are confirmed to the D.C. Circuit, you will be called upon to uphold some of Americans' most cherished constitutional rights. It is important for the American people to understand how your views on these basic issues, and how they may affect your decisions. Over the years, the Supreme Court has recognized a number of constitutional rights not explicitly set forth in the Constitution, such as one person, one vote; the right to privacy; and the right to travel. Although you have previously stated that, if confirmed, you would seek to follow applicable precedent, it is important for the Committee to understand your own views of important Constitutional principles, independent of precedents.

a. Please state, your own view as to where in the Constitution you find grounding for a right of privacy and what that constitutional right includes. Please specify whether you believe the right to privacy includes the right to choose whether and when to bear a child, and whether the right to privacy protects against government interference with access to contraception.

Response: If confirmed, I would follow the precedent of the Supreme Court of the United States and the D.C. Circuit. The Supreme Court has identified a right to privacy in various provisions of the Bill of Rights and the 14th Amendment. As defined by the Court, the right to privacy includes the right to choose whether and when to bear a child and protects against government interference with access to contraception.

b. Do you believe that the right to privacy is a fundamental right entitled to strict scrutiny, the highest level of constitutional protection?

Response: In precedent where the right to privacy has been implicated, the Supreme Court has set forth the appropriate standard of review. If confirmed, I would look to the applicable precedent and faithfully employ the standard set forth by the Supreme Court.

c. Do you believe that Roe v. Wade is settled law in the United States?

Response: *Roe v. Wade* has been reaffirmed by the Supreme Court, including in *Casey*. If confirmed as a judge on the D.C. Circuit I would certainly treat it as settled law.

Responses of Thomas B. Griffith
Nominee for the U.S. Court of Appeals for the District of Columbia
to the Written Questions of Senator Patrick Leahy

1. Up until you sent your letter of November 12, 2004 to Senator Hatch, in all of your contacts with the Committee you left the impression that 1998 was the only time you had failed to pay your D.C. Bar dues on time, and certainly the only time that your membership in the D.C. Bar was suspended for non-payment. But in that November 12 letter, and later in your December 3, 2004 answers to written questions, you indicated that 1998 was not the only time you were late with your payments. In fact, after 1995, when Wiley, Rein and Fielding paid your D.C. Bar Dues, you did not pay in a timely fashion until 2002. In 1996 you paid late, in 1997 you ignored three notices, were suspended and finally only paid in 1998, and for the 1998 dues year you never paid and were again suspended until 2001. (A) Why didn't you explain all of this on your initial questionnaire, or later in interviews with Committee investigators trying to determine the history of your membership in and payments to the D.C. Bar? (B) Why did you try to hide the initial admission in a letter sent just before your hearing, and only give more details after your public hearing? (C) Why was it so difficult for you to pay your D.C. Bar dues on time?

Response: I appreciate the opportunity to address this issue. I have always attempted to be as responsive to the Committee as my memory and available records have allowed. On my initial questionnaire, I brought to the Committee's attention that my D.C. Bar membership had lapsed for non-payment of dues on November 30, 1998, due to a clerical error. At the time I filled out my initial questionnaire, I had no recollection of the 1996 and 1997 late payments. I first became aware of the late payments in those years after discussions with the D.C. Bar to determine what records they had available. When I became aware of the timing of the 1996 and 1997 payments to the D.C. Bar, I disclosed it to the Committee in my November 12, 2004 letter. As I learned more information, I would provide it to the Committee. As I indicated in my testimony, I take full responsibility for the failure to pay my bar dues in a timely fashion. It is now my practice to personally ensure that the dues are paid every July, and I commit to the Committee that I will continue to do so.

2. You have said, and the D.C. Bar records you enclosed with your December 3 answers confirm, that when you paid your dues for 1996 (on a July 1, 1995 statement) you indicated that the D.C. Bar should send future correspondence to your home address. However, when you finally paid the 1997 bar dues (on a statement titled July 1, 1996) it appears you asked the D.C. Bar to send correspondence to your business address. (A) Why the change, if, as you indicated, you knew that the Senate would not pay your dues? (B) If the Bar knew in January 1998, when you did pay your 1997 dues, where to find you, how do you explain that

you never received your 1998 dues statement either at home or the office, as you have said?

Response: I am not aware of the documents you reference for the payment of the 1996 and 1997 D.C. Bar dues. I currently have records only for 1995 and 1996. The 1996 payment is on a statement with the billing date of October 16, 1996. I did check the address preference box for the business address, but have no recollection of why I did that or whether it was intentional. Again, I take full responsibility for the failure to pay my D.C. Bar dues in a timely manner, whether or not I received a notice at my home or business address.

3. In answer to Question 7 of my initial written questions, you answered that 66 attorneys joined Wiley, Rein and Fielding and 61 left during the two years you were there after you left the Senate. Were the bar dues of any of these attorneys not paid due to an "unintentional oversight" during their time at the firm?

Response: I do not know.

4. In response to Question 10 of my initial written questions, you answered that you had not contacted any former employers, clients or insurance carriers to notify them that you had been practicing law in Washington, D.C. while suspended from the D.C. Bar for several years. You seemed to be saying that because you paid your back dues and were reinstated, your period of suspension would be of no concern to those you represented and were in partnership with while practicing without a proper license. Please indicate where in the D.C. Statutes, D.C. Bar Rules or the rules of any court in the District of Columbia any distinction is made about the liability or culpability of a lawyer practicing while suspended based on the reason for the suspension or the subsequent reinstatement of that lawyer.

Response: I am not aware of any such authority. The D.C. Bar, however, has never brought any disciplinary proceedings as a result of this matter.

5. In a passage from an article by the D.C. Bar Counsel Joyce Peters called Dues and Don'ts. Ms. Peters says: "the failure to pay Bar dues, particularly if swiftly remedied to avoid the unauthorized practice of law, may be viewed as a relatively minor disciplinary infraction, but the length of time that the lawyer neglects to pay dues may cause a simple failure to ripen into a more serious disciplinary matter." In a 1988 case the D.C. Court of Appeals stated that "two years is clearly an excessive period of time in which to neglect payment." Do you disagree with Ms. Peters that your practice of law in D.C. without a valid D.C. license was a

disciplinary infraction? If not, please point to the specific statute or case law that supports your position.

Response: I am not expert in the law at issue and have no basis to form an opinion. It was never my intention to fail to pay my D.C. Bar dues, and I remedied the situation as soon as I was made aware of the problem. The D.C. Bar has never brought a disciplinary action against me as a result of my inadvertent failure to pay my Bar dues.

6. You were twice suspended from the D.C. Bar for non-payment of dues. In your 2003 application to the Utah Bar you falsely answered that you were never suspended from any bar. Have you now disclosed to the Utah Bar the existence, nature and duration of your suspensions from the D.C. Bar?

Response: No. The answer was part of a form that accompanied my application to take the Utah Bar. I am not a member of the Utah Bar. It is not my understanding that I have an obligation to inform them of this matter.

7. (A) If, as you say in response to Question 12b., you were aware that the Office of the General Counsel at BYU paid the bar dues of attorneys in the office, why did you make no specific arrangements for them to pay your D.C. dues? (B) How did you think they would know which bar dues to pay if you did not direct them to do it?

Response: When I moved to Utah in August 2000 I was under the mistaken impression that my law firm had paid my D.C. Bar dues for that year. In 2001, I failed to pay after receiving no notice, which was a mistake on my part. Once I learned of my mistake in October, 2001, I directed the office to pay my dues, and I have directed them to do that every year since.

8. In answer to Question 19 of my first set of written questions, you wrote that soon after your arrival in Utah you learned from your predecessor that Utah did not have a rule to allow in-house counsel to join the Utah Bar without examination. Isn't that because the Utah Bar does not treat in-house counsel any differently than other attorneys, doesn't have any "in-house" or "general" counsel exception at all, and so requires all attorneys practicing law in Utah, no matter where they work, to become members of the Utah Bar?

Response: No. It is my understanding, consistent with the letters to the Committee from the current executive director of the Utah Bar and five of its past presidents, that it has been the consistent advice of the Utah Bar over the years that in-house counsel in Utah need not be licensed in Utah provided that he or she is closely associated with Utah

lawyers, makes no court appearances, and signs no Utah pleadings, motions, or briefs. I have adhered to that advice.

9. You mention that two of your predecessors had each become a member of the Utah bar without taking the bar exam, but you take no notice that each of the three of you was operating under different sets of facts, to which Utah laws and bar rules would presumably apply differently. What made you think that just because they may have been within the rules to be admitted without examination, you were?

Response: I made no assumption that I would be admitted without examination. I was aware that each of my two predecessors had been admitted to the Utah Bar without examination after having moved to Utah from elsewhere. I asked my immediate predecessor to ask people at the Utah Bar whether I could be similarly admitted without examination. He was told that I could not, and he communicated that to me.

10. In your answers to my written questions, it seems your paramount concern was being admitted to the Utah Bar without examination. But in fact, according to Utah Bar rules, if you had just applied to waive into the bar within the first year of your practice in Utah, you could have been admitted without the examination. Why didn't you just do that?

Response: When I moved to Utah in August 2000, there was no provision that allowed me to waive into the bar. Utah did not adopt a reciprocity rule that would allow admission by waiver until sometime in late 2002. By that time, I did not fall under the scope of the rule.

11. You say you did not submit an application to take the summer 2002 bar exam because you read about a possible change in the Utah reciprocity rules in the March 2002 Utah Bar Journal. Your recollection of why you did not submit the application has not been so clear in your conversations with the Committee investigators or in any of your written correspondence with members of the Committee or in your hearing testimony. Why had you never mentioned the article in the Bar Journal before? Please provide the Committee with a copy of that article.

Response: I have attached a copy of the requested article (attachment). I have tried to always provide the Committee with all relevant information. While I cannot recall all of the details of the conversations to which you refer, I can assure you that I did not intentionally withhold information from the Committee.

12. You say that around March 2002 you placed a phone call to the then President of the Utah Bar, John Adams, to ask about the change in reciprocity rules. You never mentioned that phone call in your conversations with Committee investigators or in any of your written correspondence with members of the Committee or in your hearing testimony. In fact, although you say you refer to that phone call in your April 2003 letter to Mr. Adams, there is no such reference. Why have you never mentioned the telephone conversation with Mr. Adams before? Please recount for the Committee your exact recollection of that phone call, including whether or not you asked Mr. Adams if you needed to become a member of the Utah Bar, and whether or not Mr. Adams told you there was a "general" or "in-house" counsel exception exempting such counsel from the general rule that lawyers practicing law in Utah must be members of the Utah Bar.

Response: I do not recall not telling people of the conversation. My April 10, 2003 letter to Mr. Adams does refer to that conversation. In the next to the last sentence of the first paragraph, I state, "In discussions with the Utah Bar Association (maybe even you – my memory is not entirely accurate on this point), I was advised that the conventional wisdom was that the court would in fact promulgate a reciprocity rule." Although my memory was not clear at the time I wrote the letter, subsequently I recalled that my discussion was in fact with Mr. Adams. As best I can recall now, I told Mr. Adams that I had been told about the March 2002 Bar Journal article and was interested to learn whether it was accurate and whether, in his view, Utah was likely to adopt a reciprocity rule. I told him that I was planning on taking the Utah Bar examination that summer, but if it appeared likely that Utah would adopt a reciprocity rule, I would not take the examination. Mr. Adams was careful to say that he could not speak for the Utah Supreme Court, but he stated that it was the conventional wisdom that Utah would adopt a reciprocity rule. I do not believe that I asked Mr. Adams whether I needed to become a member of the Utah Bar or whether there was a "general" or "in-house" counsel exception, because the purpose of the conversation was to inquire into the proposed rule.

13. In response to Question 20 you say that you "formed" an "understanding . . . over the course of . . . years of practicing law," and interacting with in-house counsel during the course of your career that in-house counsel did not need to become members of the Utah Bar. (A) Did you add to the understanding by doing any independent research of your own? (B) Did you think it was sufficient to rely on a general "understanding" "formed" by your interactions with other lawyers?

Response: Other than the conversations I described in my prior answers to the Committee, I do not recall doing additional research. My understanding has been confirmed, however, by the executive director and five past presidents of the Utah Bar.

14. You wrote in your Committee questionnaire that you had begun discussing the possibility of a federal judgeship with Senator Hatch in 1999, yet in answer to Question 23c you say you did not believe there was a possibility of obtaining a judicial appointment when you wrote Mr. Adams of the Utah Bar in 2003. Please recount for the Committee in detail all of your discussions with anyone about your interest in and the possibility of your being appointed to, a federal judgeship, whether in Utah or elsewhere. Please be as specific as possible, and include all dates f all discussions as you recall them.

Response: After I left my position as Senate Legal Counsel in March, 1999, I spoke with several people, including Senator Hatch, to express my interest in a federal appellate judgeship. In 2002, I again approached individuals in the Administration and the Senate to express my interest in a federal appellate judgeship. Although I had expressed interest, I do not know that I was considered for such a position until the fall of 2003, after the D.C. Circuit position again became available for nomination. Therefore, when I wrote to Mr. Adams in April 2003, it was accurate to say that I did not believe it was likely that I would be nominated to a federal judicial position.

15. In response to Question 25 of my first set of written questions you say that in January 2004, sometime after you say you "had some reason to believe that President Bush might soon nominate" you for the D.C. Circuit bench, you asked a second-year law student in your office to research the laws and rules applicable to your situation. (A) If you were so sure that you did not need to become a member of the Utah Bar, why did you ask her to do this research? (B) Why hadn't you asked anyone to do this research when you first arrived in Utah or even when you first accepted the position?

Response: I have no clear memory why I asked her to do this research. I did not do this research or ask anyone to do this research previously because it was my understanding, based on my previous experience, my discussions with experienced Utah lawyers, and my observations after I arrived in Utah, that in-house counsel in Utah need not be licensed in Utah.

16. You say the law clerk recommended you take the bar examination. Please provide the Committee with the name of the law clerk and current contact information for her, as well as any memoranda between you and the law clerk, between you and anyone else and between the law clerk and anyone else on this subject. If you claim those documents would be privileged, please explain why, including supporting citations of case law and statute.

Response: I brought this request to the attention of the University and recused myself from determining the appropriate response. I have been informed by the University that the information is privileged and confidential and will not be released.

17. No question 17 was submitted.

18. In your answers to my first set of written questions and the questions submitted to you by Senator Feingold after your first hearing, you are quite clear that you are giving legal advice, which is included in the Utah Supreme Court's definition of the practice of law. You maintain that you may do that and not become a member of the Utah Bar because you are "closely associating" with lawyers who are members of the Utah Bar. You also freely admit that your definition of "close association" really just means that you "consult" with Utah lawyers (whose boss you happen to be) but that you give legal advice to your superiors. How can it be that in a state where there is no "in-house" or "general" counsel exception, and where the Bar's general counsel herself clearly described the option of restricting your duties to non-l gal ones or closely associating yourself with Utah lawyers to do the legal work, that what you do is not the unauthorized practice of law?

Response: My understanding is consistent with the views expressed in the letters to the Committee by the current executive director of the Utah Bar and five of its past presidents that the way I have organized my affairs at the University does not constitute the unauthorized practice of law.

19. On May 14, 2003, Katherine Fox, General Counsel of the Utah Bar wrote you a letter expressing "surprise" that you thought there was a general counsel exception to the Utah, and saying it was "unfortunate" you relied on a speculative rules change. Any fair reading of the letter would indicate that Ms. Fox believed you had no choice but to take the bar examination, and until you did to stop practicing law. If that was not possible, it is clear that she tells you in the meantime, you should closely associate yourself with a Utah-licensed lawyer. On occasions after May 14, 2003, you have explained that you believe you need not be a member of the Utah Bar as long as you "closely associate" yourself with a member of the Utah Bar. You have indicated that upon your arrival in Utah you organized your work at BYU to comply with that loophole, but on an indefinite basis. (A) Had you indeed heard of this possibility before you read Ms. Fox's letter? (B) Can you provide the Committee with any evidence, other than your own statements since you received Ms. Fox's letter, that before you received her letter and read its final paragraph you believed the so-called "closely associate" loophole protected you, or that you organized your work to comply with the alleged loophole?

Response: It has been my understanding since before assuming my position at BYU that as in-house counsel, I need not be licensed in Utah as long as long I am closely associated with Utah lawyers, make no court appearances, and sign no Utah pleadings, motions, or briefs. Those with whom I work in the Office of the General Counsel can attest that since I have arrived at the University, I have been closely associated with members of the office and/or with outside counsel licensed in Utah on all legal maters in which I have been involved.

20. (A) Since the beginning of the time when you believed you might be nominated to a federal court seat until now, about how many hours would you say you have devoted to the nomination and confirmation process including, preparing materials for the Committee, meeting with White House, Department of Justice and Senate staff, meeting with Senators, preparing for your hearing, traveling to Washington, and any other time you may have spent? (B) Do you think that amount of time is equal to, is less than or exceeds the number of hours you would have to devote to preparing to take the Utah Bar examination?

Response: I have spent many hours on the nomination and confirmation process. Based on my prior experience preparing for a bar exam, I would estimate that the time it would take to prepare for the bar exam would take considerably longer.

Utah Multijurisdictional Practice Rule

In October of 2000, the Multijurisdictional Practice ("MJP") Task Force was established by the Board of Bar Commissioners to examine whether or not the present practice of admitting lawyers to the Utah State Bar was serving the public, the legal profession, and the needs of clients. Another factor prompting the formation of the Task Force was the fact that Utah had been invited to join with the neighboring states of Washington, Oregon, and Idaho to participate in a "Pacific Northwest Coalition" which would cooperate on licensing issues and streamline the admission of attorneys practicing in Coalition states. The Board asked the MJP Task Force to investigate whether or not it made sense for Utah to participate in the Pacific Northwest Coalition.

In light of the fact that American society and business today are less defined by geography and lawyers increasingly find themselves representing clients who have a presence in multiple jurisdictions, the trend has been for states to allow lawyers from other states to be licensed to practice law within their borders without having to retake a bar exam. This streamlined process of admission is referred to as "reciprocity." Of the approximately 55 U.S. lawyer licensing jurisdictions, over one-half (29 jurisdictions) allow reciprocal admissions. Currently, Utah does not offer reciprocity to attorneys from other states. Under Utah's licensing rules, even attorneys who have been practicing for five years or more are required to take the essay portion of the bar exam before they can be licensed to practice.

After reviewing the issue of reciprocity, the MJP Task Force concluded that offering reciprocal admissions would be beneficial in a number of ways. First, it simplifies the admission process for lawyers who have a reasonable level of prior experience, and allows attorneys more freedom to relocate to other areas of the country. Thirteen of the states that offer reciprocity do so under a policy of "if your state lets our attorneys in, we will let your state's attorneys in." Thus, by adopting reciprocity Utah would not only be allowing outside attorneys an easier licensing option, but Utah attorneys would have the opportunity to move to other parts of the country and be licensed in other states that have reciprocal admission rules.

Second, with reciprocity in place, clients who do business in a number of states can ask the lawyers who represent them to get licensed in these other states. This prevents the client from incurring the expense and inconvenience of hiring a second law firm to assist them with their legal problems. Third, easing licensing requirements for practicing attorneys recognizes that with new technology, law practice is no longer restricted to "state-based" practitioners. Computerized legal research allows attorneys to easily cross boundaries and familiarize themselves with state-specific case law, codes, and administrative rules as needed.

Finally, it is possible to incorporate a number of requirements into the reciprocity rule to insure that clients and the public at large are protected. The following requirements have been incorporated into the proposed rule: (1) completion of a minimum number of years of practice as an attorney, (2) graduation from an ABA-approved law school, (3) passage of the bar examination in at least one state, (4) establishment of the applicant's good moral character, (5) attendance at a minimum of fifteen hours of continuing legal education classes in Utah within six months of licensing to ensure out-of-state attorneys are educated on the rules of practice, key substantive law differences, and the ethics rules of Utah, (6) be subject to disciplinary action in Utah, and (7) comply with all other applicable requirements of Bar membership, including payment of licensing fees.

The proposed rule, as published below, was drafted by the MJP Task Force after referencing the reciprocity rules of 20 other states and incorporates a good deal of the ABA's Model Rule on Reciprocity. The rule utilizes a two-tier system that provides for two different practice requirements, one for Pacific Northwest states and another for all other states who offer reciprocity to Utah attorneys. The two-tier system is necessary because the Coalition states have already established a three-year practice rule, while the ABA Model rule and the majority of other states utilize a five-year practice rule. In order to be part of the Pacific Northwest Coalition, it is necessary that Utah's rule establish a lower years-of-practice rule for attorneys from Oregon, Washington, and Idaho than is set for attorneys applying from other U.S. jurisdictions.

The MJP Task Force presents this proposed rule to the Utah State Bar for comment. If the majority of Bar members favor reciprocity, the rule will be presented to the Board of Bar Commissioners for approval. If approved by the Board, a petition will be filed with the Utah Supreme Court. Court approval is necessary before the rule goes into effect. **All comments regarding the proposed reciprocity rule are welcome. Remarks may be mailed to**

the Utah State Bar at 645 South 200 East, Salt Lake City, Utah 84111, or e-mailed to the Deputy General Counsel in charge of Admissions, Joni Dickson Seko. Her e-mail address is joni.seko@utahbar.org. Comments may also be sent by facsimile to (801) 531-0660. The comment period runs through April 2, 2002.

PROPOSED RULE FOR ADMISSION OF LAWYERS LICENSED IN OTHER STATES OR TERRITORIES OF THE UNITED STATES OR THE DISTRICT OF COLUMBIA TO PRACTICE LAW IN UTAH

1. An applicant may, upon motion, be admitted to the practice of law in this jurisdiction if the applicant has been admitted to another state, territory or the District of Columbia where admission by motion is authorized and the applicant meets the requirements of 1(a) through (11) of this rule.

   The applicant shall:

   (a) Have been admitted by bar examination to practice law in another state, territory, or the District of Columbia;

   (b) Hold a first professional degree in law (J.D. or LL.B.) from a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association at the time the degree was conferred;

   (c) Have been substantially and lawfully engaged in the active practice of law in Idaho, Oregon or Washington for no less than three years, and have been substantially and lawfully engaged in the practice of law in one of the aforementioned states for any three of the four years immediately preceding the date of the filing of application for admission under this rule.

   (d) An applicant who is engaged in the active practice law in the District of Columbia or in a state or territory other than Idaho, Oregon, or Washington may file for admission under this rule if he or she has been substantially and lawfully engaged in the practice of law in such jurisdiction for five years, and has been substantially and lawfully engaged in the practice of law for any five of the seven years immediately preceding the date of the filing of application for admission under this rule;

   (e) Has received a passing score on the Multistate Professional Responsibility Examination as established by the Board of Bar Commissioners ("Board") of the Utah State Bar;

   (f) Present satisfactory proof of both admission to the practice of law and that he or she is a member in good standing in all jurisdictions where currently admitted;

   (g) File with the application a certificate from the entity having authority over professional discipline for each jurisdiction where the applicant is licensed to practice which certifies that the applicant is not currently subject to lawyer discipline or the subject of a pending disciplinary matter;

   (h) Present satisfactory proof demonstrating that he or she have been substantially and lawfully engaged in the practice of law for the applicable period of time;

   (i) Establish that the applicant possesses the good moral character and fitness requisite to practice law in the State of Utah and evidence of his or her educational and professional qualifications;

   (j) Establish that the state, territory, or District of Columbia which licensed the applicant allows the admission of licensed Utah lawyers under terms and conditions substantially similar to those set forth in these rules, provided that if the state, territory, or District of Columbia requires Utah lawyers to complete or meet other conditions or requirements, the applicant must meet a substantially similar requirement for admission in Utah;

   (k) Pay upon the filing of the application the fee established for such admission; and

   (l) File a duly acknowledged instrument, in writing, setting forth his of her address in this State and designating the Clerk of the Utah Supreme Court as his or her agent upon whom process may be served.

2. For the purposes of this rule, the "active practice of law" shall include the following activities, if performed in a jurisdiction in which the applicant is admitted, or if performed in a jurisdiction that affirmatively permits such activity by a lawyer not admitted to practice; however, in no event shall activities listed under (2)(e) and (f) that were performed in advance of bar admission to the Utah State Bar be accepted toward the durational requirement:

   (a) Representation of one or more clients in the private practice of law;

   (b) Service as a lawyer with a local, state, or federal agency, including military service;

   (c) Teaching law at a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association;

(d) Service as a judge in a federal, state, or local court of record;

(e) Service as a judicial law clerk; or

(f) Service as corporate counsel.

3. For the purposes of this rule, the active practice of law shall not include work that, as undertaken, constituted the unauthorized practice of law in the jurisdiction in which it was performed or in the jurisdiction in which the clients receiving the unauthorized services were located.

4. An applicant who has failed a bar examination administered in this jurisdiction within five years of the date of filing an application under this rule shall not be eligible for admission on motion.

5. All applicants admitted to practice law pursuant to this rule shall complete and certify no later than six months following the applicant's admission that he or she has attended at least fifteen hours of continuing legal education on Utah practice and procedure and ethics requirements. The Board of Bar Commissioners may by regulation specify the number of hours of the required fifteen hours that must be in particular areas of practice, procedure, and ethics. Included in this mandatory fifteen hours is attendance at Utah's Ethics School. This class is offered twice a year and provides six credit hours. The remaining nine credit hours must be made up of New Lawyer Continuing Legal Education ("NLCLE") courses. Twelve of the fifteen hours may be completed through self-study by access to Utah's on-line education system. The above fifteen hours will apply towards the twenty-seven hours required per compliance period.

6. All applicants admitted to practice law pursuant to this rule shall be subject to and shall comply with the Utah Rules of Professional Conduct, the Rules Governing Admission to the Utah State Bar, the Rules of Lawyer Discipline and Disability and all other rules and regulations applicable to members of the Utah State Bar.

7. All applicants admitted to practice law pursuant to this rule shall be subject to professional discipline in the same manner and to the same extent as members of the Utah State Bar. Every person licensed under this rule shall be subject to control by the courts of the State of Utah and to censure, suspension, removal or revocation of his or her license to practice in Utah.

8. All applicants admitted to practice law pursuant to this rule shall execute and file with the Utah State Bar a written notice of any change in such person's good standing in another licensing jurisdiction and of any final action of the professional body or public authority referred to in 11(g) of this Rule imposing any disciplinary censure, suspension, or other sanction upon such person.

9. If, in the judgment of the Utah Supreme Court, it is in the best interest of the State of Utah to discontinue reciprocity with other states, such decision may be implemented immediately by order of the Court.

10. **Form and Content of Application.**

(a) A reciprocal applicant shall file an application for admission to the practice of law with the Office of Admissions. The applicant must provide a full and direct response to questions contained in the application in the manner and time prescribed by the Rules Governing Admission to the Utah State Bar. The Board may require additional proof of any facts stated in the application. In the event of the failure or the refusal of the applicant to furnish any information or proof, or to answer any inquiry of the Board pertinent to the pending application, the Board may deny the application.

(b) An application shall include an authorization and release to enable the Board to obtain information concerning such applicant. By signing this authorization and release, an applicant waives his or her right to confidentiality of communications, records, evaluations, and any other pertinent information touching on the applicant's fitness to practice law as determined by the Board.

11. **Timing of Application and Admission.**

(1) A reciprocal application may be filed at any time.

(2) Upon approval of the application by the Board of Commissioners, the Board shall recommend to the Supreme Court the admission of the applicant to the Utah State Bar. Candidates who meet the requirements herein stated in this rule and who have paid to the Utah State Bar the membership fee for the current year, will have their name placed on a Motion for Admission to the Bar. Motions for Admission are presented to the Utah Supreme Court three times a year, October, February and May.

April 4, 2005

The Honorable Patrick J. Leahy
United States Senate
Ranking Member, Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C. 20510

RE: Response to Letter of March 30, 2005

Dear Senator Leahy:

This letter responds to yours of March 30, 2005. With respect to the determination whether the requested information is confidential, Brigham Young University is the client, not me. As stated in my previous written answer, I recused myself from the University's determination whether the requested information was confidential and should be produced. That determination was made by the Office of the General Counsel at Brigham Young University without any involvement by me. I was not party to any of the discussions that led to the University's determination. I have forwarded your letter to the University for its consideration.

Sincerely,

Thomas B. Griffith

kk

cc: The Honorable Arlen Specter
United States Senate
Chairman, Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

United States Department of Justice
Office of Legal Policy

SUBMISSIONS FOR THE RECORD

LAW OFFICES
Albright, Stoddard, Warnick & Palmer
A PROFESSIONAL CORPORATION
QUAIL PARK I, SUITE D-4
801 SOUTH RANCHO DRIVE
LAS VEGAS, NEVADA 89106

TELEPHONE
(702) 384-7111
FACSIMILE
(702) 384-0605
SENDER'S
E-MAIL ADDRESS

G. VERN ALBRIGHT
WILLIAM H. STODDARD
WHITNEY B. WARNICK*
G. MARK ALBRIGHT
WILLIAM D. PALMER II
GARY G. BRANTON†
D. CHRIS ALBRIGHT
BRADLEY M. BALLARD
TAMI C. BUDD††
C. ADAM BUCK
TONY M. MAY, P.E.††
MICHELLE L. ANDERTON
ROBERT W. CURTIS, J.D.
ANTHONY W. STIRLING, J.D.
BRENT D. GUST, J.D.

* ALSO LICENSED IN UTAH
† ALSO LICENSED IN CALIFORNIA
** ALSO LICENSED IN ARIZONA
†† ALSO LICENSED IN IOWA

August 18, 2004

SENT VIA FACSIMILE - (202) 228-1698
The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Confirmation of Thomas R. Griffith

Dear Mr. Chairman:

It has been my distinct pleasure over the last thirty (30) years to have been a close friend and associate of Thomas R. Griffith. We worked together as young men and I followed his professional career with interest in Washington, D.C. with a private law firm, as counsel for the U.S. Senate, and finally as General Counsel for Brigham Young University.

Our law firm has worked with Tom on legal matters including a suit brought by an airline against Brigham Young University. I have always found Tom to be one of the most capable and outstanding lawyers that I have had the pleasure to be associated with. Our firm is currently serving as local counsel for dozens of national law firms and we have represented and acted as local counsel in dozens of national class action suits dealing with attorneys from throughout the United States.

It is my personal opinion that Thomas Griffith is one of the finest attorneys in the Country. He is articulate and knowledgeable on legal matters impacting our society and economy. He is a credit to the bar and the Nation. It is my opinion that he would be an excellent Appellate Judge who would uphold the highest standards expected by the legal profession. His honesty and integrity are

beyond reproach. He is a man of dignity. I highly recommend Thomas Griffith as a person who would serve with distinction on the D.C. Circuit Court. He is ethical, hard working, and scholarly in his analysis of complex legal issues. Please do not hesitate to call should your office have any questions regarding the foregoing.

Very truly yours,

ALBRIGHT, STODDARD, WARNICK & ALBRIGHT

G. MARK ALBRIGHT, ESQUIRE

GMA:caa
cc: The Honorable Patrick J. Leahy via facsimile (202) 224-9516
Office of Legal Policy, United States Department of Justice via facsimile (202) 514-5715

ALLIANCE FOR JUSTICE

Alliance for Justice Report in Opposition to the Nomination of Thomas B. Griffith to the U.S. Court of Appeals for the D.C. Circuit

Introduction

Attorney Thomas B. Griffith, the General Counsel of Brigham Young University, has been nominated by President Bush for a seat on the D.C. Circuit, the court often described as the second most important court in the country. Because Griffith has spent most of his career in private practice and in non-partisan governmental and university positions, his public record is limited. Nevertheless, the record that does exist raises questions and concerns about Griffith's views on important issues of civil rights, federalism, and the separation of church and state. In addition, Griffith's failure to maintain his active membership in the District of Columbia bar and his apparent failure to join the bar in Utah raise a serious ethical issue. He has received the lowest passing rating from the American Bar Association with a bare majority of the The members of the Senate Judiciary Committee must question him closely on these issues in order to fairly assess his fitness for the bench. Unless and until he can provide satisfactory answers to such questions, the Alliance for Justice must oppose his nomination.

Brief Biography

- Age 50. Born July 5, 1954.
- B.A. *summa cum laude*, Brigham Young University 1979.
- J.D., University of Virginia 1985.
- Associate at Robinson, Bradshaw and Hinson 1985-1989.
- Associate and Partner at Wiley, Rein and Fielding 1989-1995.
- Senate Legal Counsel 1995-1999.
- Partner at Wiley, Rein and Fielding 1999, 2000.
- General Counsel, Advisory Commission on Electronic Commerce 1999-2000.
- Assistant to President and General Counsel, Brigham Young University 2000 – present.
- Commissioner, Secretary of Education's Commission on Opportunity in Athletics, 2002-2003.

Griffith currently serves as Assistant to the President and General Counsel at Brigham Young University, a position he has held for the past four years. Prior to taking the post there, he was Senate Legal Counsel and a partner at the law firm Wiley, Rein and Fielding in Washington, DC. Griffith has been active in Republican politics over the last several years. Like many of President Bush's judicial nominees, he is a member of the conservative Federalist Society. Since 1996, Griffith has been the Vice-Chairman, then Senior Legal Advisor of that organization's Federalism and Separation of Powers Practice Group.

Law Firm Practice

Griffith began his legal career as an associate at the law firm of Robinson, Bradshaw and Hinson in North Carolina in general practice, working on corporate, commercial, securities, and employment litigation. After four years there, he moved to the Washington D.C. firm of Wiley, Rein & Fielding[1] where he worked in the areas of environmental insurance coverage litigation and regulatory investigations. He became a partner during his time at that firm.

During his time in private practice, Griffith tried very few cases. In fact, according to his questionnaire, he only reports trying a total of six cases to verdict, three as sole counsel and three as associate counsel. He has never had a jury trial. He has only been involved in one criminal case, as a pro bono attorney in a state habeas corpus proceeding in a Virginia death penalty case.

Record as Senate Legal Counsel

Griffith served as Senate Legal Counsel from 1995 to 2000. The Office of Senate Legal Counsel "represents the Senate, its committees, members, officers, and employees in actions related to their official or representative capacities. The office also provides representation when a subpoena is directed to the Senate, its committees, members, officers, or employees. . . . The legal counsel may also be directed by a Senate resolution to bring a civil action to enforce a Senate committee subpoena."[2] The Senate Legal Counsel is appointed by the president *pro tempore* from among candidates recommended by the majority and minority leaders. The appointment is to be made without regard to political affiliation.[3]

During Griffith's tenure as Senate Legal Counsel, the most significant matter he handled was the impeachment trial of President Clinton before the Senate in 1998 and 1999. According to his questionnaire, he advised Senate leaders, members and

---

[1] Fielding is Fred Fielding, the former White House Counsel to President Reagan, whom Griffith has identified as his professional mentor.
[2] *See* http://permanent.access.gpo.gov/lps12426/www.senate.gov/learning/brief_10d.html
[3] 2 U.S.C. §288.

employees on how to conduct the trial in accordance with the Constitution, Senate rules and precedent, and judicial decisions.

Also as Senate Legal Counsel, in *Clinton v. City of New York*[4] Griffith argued before the United States Supreme Court regarding the constitutionality of the Line-Item Veto Act, which allowed the president to cancel a portion of a law passed by Congress. Griffith argued as *amicus curiae* on behalf of the Senate that the Act was constitutional; however the Supreme Court disagreed and struck down the law. The Supreme Court held that the Act violated the Presentment Clause of the Constitution. In a prior related case, *Raines v. Byrd*[5], Griffith represented the Senate in another challenge to the Line Item Veto Act, which was dismissed by the Supreme Court for lack of standing by the plaintiffs.

Griffith has identified a number of his activities as Senate Legal Counsel as among his most significant legal activities. These include: his representation of the Senate in the Whitewater II investigation from 1995-1996, the Senate Campaign Finance Investigation from 1997-1998, and his representation of the Senate in the contested Louisiana senatorial election of 1996. In some of his speeches and writings, Griffith has indicated that he actually agreed with a Democratic senator on the legal issues surrounding this contested election, much to the disappointment of then Republican majority leader Senator Trent Lott.[6]

Griffith's Views on Important Legal Issues

As noted at the outset of this report, as a lawyer who has spent his career in private practice and nonpartisan public positions, Griffith has not made his views known on many critical issues of federal law. Nevertheless, through his activities, speeches, and writings, it is possible to discern something about Griffith's views on at least a few important issues, including women's rights and affirmative action, "states' rights, and the role of religion in the law.

Title IX, Women's Rights and Affirmative Action

Griffith has made clear his opposition to key aspects of Title IX of the Education Amendments of 1972, the landmark law that bars gender discrimination in educational institutions, and has raised questions about his commitment to upholding other civil rights laws. Griffith served as a Commissioner on Secretary of Education Roderick Paige's Commission on Opportunity in Athletics (Title IX Commission) in 2002 and 2003. The Commission was created by Secretary Paige to evaluate whether and how current standards governing Title IX's application to athletics should be revised. Many women's rights groups were concerned that the commission did not deal with several of

[4] 524 U.S. 417 (1998).
[5] 521 U.S. 811 (1997).
[6] Thomas B. Griffith, *Lawyers and the Rule of Law*, UTAH BAR JOURNAL, Vol. 16, No. 7, Oct. 2003.

the problems that still hinder women's participation in athletics such as the fact that women still only get a minority share of budgets, recruiting expenses, scholarship dollars, and participation opportunities in college sports despite the fact that they are in the majority on most college campuses.[7] Instead, the Commission made a series of recommendations that would have seriously weakened the application of Title IX to intercollegiate athletics. Secretary Paige ultimately rejected these recommendations.

Griffith not only joined in the Commission's harmful recommendations, he tried to go further. Under existing regulatory policies governing intercollegiate athletics, an educational institution may comply with Title IX's requirements by satisfying any one of three separate tests for gender nondiscrimination. Griffith proposed to eliminate one piece of this "three-prong" test, the "substantial proportionality" test. Under this prong, a school must demonstrate that it offers athletic opportunities to men and women that are in substantial proportion to each gender's representation in the student body.

Griffith spoke out against the substantial proportionality test, arguing that it inappropriately allowed for the use of numeric formulas. He stated that he was, "unalterably opposed to any numeric formulas which attempt to capture the spirit of Title IX, because that's opposed to the letter of Title IX."[8] He went on to say:

> Numeric formulas violate the express terms of the statute. They violate the equal protection clause of the Constitution. They are morally wrong and they are logically flawed. There is no connection between gender ratios in the undergraduate enrollment and interest in athletics, any more than there is interest in any discipline. The fundamental evil Title IX combats is treating individuals as members of a class defined by their gender. That is, quite simply, wrong. It should not be perpetuated in any way, shape or form ...The Department of Education never should have, nor should it now continue, any remedy that relies on numeric formulas. It is illegal, it is unfair and it is wrong.[9]

Griffith's views regarding the substantial proportionality test have been rejected by eight separate federal courts of appeals, every one that has considered the issue. When asked about these circuit court holdings, Griffith declared that "the courts got it wrong" and that "I don't believe in the infallibility of the Judiciary."[10]

Griffith's proposal was rejected by the Commission by a vote of 11-4. Griffith himself has subsequently acknowledged that his position on this issue was "radical" and

---

[7] Welch Suggs, *Proposals on Title IX Intensify the Debate Over Gender Equity*, CHRONICLE OF HIGHER EDUCATION, Feb. 14, 2003.
[8] Transcript of January 30, 2003 hearing of the Commission on Opportunity in Athletics, p. 26.
[9] *Id.* at 26-27.
[10] *Id.* at 28 and 115.

"went down in flames."[11] Nevertheless, Griffith continues to argue that "the development of the Department of Education's interpretations of Title IX goes beyond the authority it has been delegated by Congress."[12]

Griffith's treatment of the substantial proportionality prong also has broader implications for his approach to enforcement of our nation's civil rights laws. His opposition to what he calls "numeric formulas" strongly suggests that he may be hostile to many traditional affirmative action remedies for discrimination in employment and contracting, as well as to the well-established use of statistical evidence to demonstrate that facially neutral practices have a disparate, adverse impact on women and racial or ethnic minorities.

Griffith's stand on Title IX has led the American Association of University Women, the Leadership Conference on Civil Rights, Legal Momentum, the National Council of Jewish Women, the National Women's Law Center, the Partnership, and the Women's Sports Foundation to oppose his nomination and has caused the National Coalition for Women and Girls in Education to voice their serious concern.

"States' Rights"

Though Griffith does not appear to have publicly discussed his views regarding the Supreme Court's recent federalism jurisprudence, his service as Vice-Chairman and Senior Legal Advisor of the Federalist Society's Federalism and Separation of Powers practice group since 1996 should raise serious concerns about his likely support for "states' rights." As the Supreme Court in recent years has repeatedly narrowed the powers of Congress and the federal courts to compel state governments to comply with federal civil rights, environmental and other laws, prominent lawyers closely connected to the Federalist Society have been at the forefront of efforts to advance this "states' rights" agenda, and the Federalism and Separation of Powers section of that organization has repeatedly provided a forum for advocates of limited federal authority to shape their arguments and to develop their litigation agenda. Two Federalist Society members in particular, now Sixth Circuit Judge Jeffrey Sutton and former Alabama Attorney General and now Eleventh Circuit Judge William Pryor,[13] have led the states' rights push in cases before the Supreme Court.

No nominee to the federal bench should be judged simply by the company he keeps, and Griffith should not be tarred with Sutton and Pryor's views on these federalism issues. Nevertheless, his service in a prominent role in the Federalist Society practice group that addresses these critical issues does give rise to a concern that Griffith

---

[11] Remarks at 43rd Annual Conf. of National Assn. of College and Univ. Attorneys, June 22, 2003.
[12] Thomas B. Griffith, *Lawyers and the Rule of Law,* UTAH BAR JOURNAL, Vol. 16, No. 7, Oct. 2003.
[13] Pryor's nomination by President Bush to a seat on the 11th Circuit has been stalled in the Senate, but on Feb. 20, 2004, President Bush appointed him to that court temporarily during a Senate recess. Pryor's term on the court will expire at the end of the Congressional session in 2005.

may share much of their outlook on these questions. The Senate Judiciary Committee would not be doing its job if it failed to closely question Griffith about his views on federalism issues or insist that he provide meaningful answers.

Religion and the Law

A number of Griffith's speeches and writings discuss the relationship between religion and the law. Griffith believes that lawyers "must reject the tendency to place our professional and religious lives in separate compartments."[14] He frequently invokes the name of St. Thomas More, the patron saint of lawyers and politicians, and calls upon lawyers to emulate More, who did not abandon his faith as a lawyer.[15] More significantly, Griffith seems to believe that the rule of law is based in faith and that lawyers should work to build a religious community. He has written: "The rule of law, the idea that each human being is entitled to the protection of the law, is most firmly rooted and grounded when we approach an understanding of what the Savior has done for each human being. Thus the calling of lawyers is to build communities based on the rule of law, communities that reach us in the direction of a Zion society, a place where the power of the Atonement unites us."[16]

Griffith's extensive discussion of religion in his speeches and writings makes clear that his faith would guide him in his service as a judge. In principle, there is nothing wrong with that. Griffith, however, has been noticeably less forthcoming about the relationship between religious beliefs and the dictates of the law. How should a judge reconcile a conflict between his faith and the rule of law? Could he render a judgment that was legally correct but contrary to his religious beliefs? Does he acknowledge the separation of church and state that is at the core of our secular constitutional democracy? These questions must be answered before the Senate can pass judgment on his fitness for the bench.

Judicial Activism

In one of Griffith's speeches, later published in the Utah Bar Journal, Griffith discussed the battles over a number of President Bush's appeals courts nominees and the cynicism many feel toward lawyers. He laid the blame for this cynicism on "activist judges": "Nominees who argue that their representations of particular clients in individual matters are not insights into how they would act as judges are found by some to be unbelievable. People cannot imagine that a lawyer or a judge would act out of any

---

[14] Speech, *How Do We Practice Our Religion While We Practice* before the J. Reuben Clark Law Society, Salt Lake City Utah, Nov. 19, 2003.

[15] Speech, *Lawyers and the Atonement of Christ: Practicing Religion by Practicing Law*, Ave Maria College of Law, March 11, 2004.

[16] Thomas B. Griffith, *Lawyers and the Atonement*, Clark Memorandum (J. Reuben Clark Law School), Spring 2001. *See also* Thomas B. Griffith, *Lawyers and the Atonement*, Life in the Law (Galen L. Fletcher et al. eds. 2002).

motive other than personal interest and bias. The legal realists, the advocates of critical legal studies, and the deconstructionists seem to have won the battle. Unfortunately, activist judges have given them grounds to make their cynical arguments."[17]

Griffith's remarks are similar to the comments of many ultra-conservative lawyers, legal commentators, and legislators who have decried "liberal judicial activism" and argued that progressive legal rulings with which they disagreed were motivated by nothing more than the judges' "personal interest and bias." Griffith should be pressed to identify the precise legal rulings he believes reflect such judicial activism.

Bar Membership and Legal Ethics

Apart from his views on substantive legal issues, Griffith has come under criticism for two significant failures to adhere to legal ethics rules regarding bar membership and the unauthorized practice of law. At a time when he was still practicing law in Washington, D.C., he allowed his District of Columbia Bar membership to lapse for almost three years for failure to pay required dues. And it now appears that, despite having practiced law in Utah for the past four years as the General Counsel at Brigham Young University, Griffith has never become a member of the Utah bar.

The lapse in Griffith's D.C. bar membership occurred during his time as Senate Legal Counsel and continued after his return to practice with Wiley, Rein, and Fielding. According to his Senate Judiciary Committee Questionnaire, Griffith's membership in the District of Columbia bar lapsed for non-payment of dues in November 1998 and was not reinstated until November 2001. He cited a clerical oversight as the reason for this lapse and maintains that it was corrected as soon as it was brought to his attention.

A clerical oversight, however, cannot explain his failure to join the Utah bar. After apparently concluding that he needed to establish bar membership in that state, Griffith registered to sit for the Utah bar exam, but he did not take the examination.[18] Griffith was unable to obtain a reciprocal state license because he failed to meet the requirement of being an attorney in good standing in his previous state for three of the four previous years due to the lapse of his D.C. bar membership.[19] Griffith's position at BYU does not appear to fall into any exception that would allow him to practice without becoming a member of the bar. According to Brigham Young's web site, the General Counsel is responsible for advising the Administration on all legal matters pertaining to the University and also directs and manages all litigation involving the University.[20] Yet, for the past four years, Griffith has acted in that capacity without a state license. In fact,

---

[17] Griffith *supra* note 6 at 17-18.
[18] Carol D. Leonnig, *Judicial Nominee Practiced Law without License in Utah*, WASHINGTON POST, June 21, 2004.
[19] *Id.*
[20] *See* https://bronx.byu.edu/ry/stlife/prod/Handbook/University/Organization/President.html#P30_2208

during his first year as general counsel Griffith was not a member of any bar because his D.C. membership had lapsed.

Griffith's disregard for licensing requirements raises serious questions about his fitness for the bench, especially if he knowingly and intentionally ignored the requirement to join the bar in Utah. The *Washington Post* reported that last year the state bar wrote a letter to Griffith recommending that he take the state bar exam and in the meantime work closely with a Utah bar member while his bar application was pending.[21] The deputy general counsel for the Utah State Bar also indicated that most general counsels overseeing legal work for a university are required to have a state license.[22] According to Mark Foster, a lawyer specializing in legal ethics, who was asked to comment on the lapse in D.C. bar membership: "He was practicing law without a license, and that is a very serious problem. . . . The judge is the guy who enforces the rules. Do you really want a guy to enforce the rules who doesn't obey the rules?"[23] After news of Griffith's failure to obtain a license in Utah became known, Foster expressed greater concern about his nomination, commenting that "This moves it for me from the realm of negligence to the realm of willfulness. People who thumb their noses at the rules of the bar shouldn't be judges."[24]

Background on the D.C. Circuit

Griffith has been nominated to the seat vacated by Judge Patricia Wald. President Bush previously nominated Miguel Estrada to this seat, but Estrada withdrew as a nominee last fall after Democrats in the Senate successfully filibustered his nomination.

The D.C. Circuit is widely viewed as second only to the Supreme Court in influence over law and policy in this country. In addition to having exclusive jurisdiction over appeals from the D.C. District Courts, Congress has conferred on the court concurrent or exclusive jurisdiction over the interpretation of many federal statutes and over the validity of regulations issued by many executive agencies. As a result, the D.C. Circuit establishes precedent in areas such as labor and workers' safety laws and environmental protections that affect all Americans in very significant ways. The court is also a stepping-stone for nomination to the Supreme Court. Three of the current Supreme Court Justices, Justices Scalia, Thomas and Ginsburg all served on the D.C. Circuit before elevation to the Supreme Court.

The D.C. Circuit currently has five active Republican-appointed judges, four active Democrat-appointed judges, and three vacancies. During the previous administration, President Clinton nominated Elena Kagan and Allen Snyder to the court, but the Republican-controlled Senate held up both nominations claiming that there was a

---

[21] *See* Leonnig *supra* note 18.
[22] *Id.*
[23] Carol D. Leonnig, *Appeals Court Nominee Let His Bar Dues Lapse*, WASHINGTON POST, June 4, 2004.
[24] Leonnig *supra* note 18.

reduced caseload and the seats did not need to be filled, thus preserving the opportunity for a Republican president to give his party a majority on the court. Had Snyder and Kagan been confirmed, filling the remaining vacancies with Republican nominees would have retained the court's balance.

The D.C. Circuit nominations of Griffith, Kavanaugh, and Janice Rogers Brown, who is currently being filibustered in the Senate, must be considered in the context of the Republicans' efforts during the Clinton years to hold seats vacant in the hopes of a Republican takeover of the White House, as well as of the court's current breakdown. Recent studies have confirmed that appellate panels come to very different results in cases dealing with significant issues including environmental protection, campaign finance and employment discrimination, depending on whether the panel is made up of Republican or Democratic appointees.[25] Furthermore, the partisan and ideological breakdown on the court has proven critical in several *en banc* decisions issued by the D.C. Circuit over the last ten years. Many of these cases were decided by just one vote.[26]

Conclusion

Thomas Griffith's nomination to the U.S. Court of Appeals for the D.C. Circuit raises troubling issues. His publicly stated views on Title IX suggest that he may have great difficulty enforcing not only that law, but many of our nation's central civil rights statutes. His prominent role in the section of the Federalist Society devoted to federalism issues, his frequent comments about the role of religion in law, and his accusations against unnamed "activist judges" give rise to fair questions about his ideological views and his ability to dispense fair and impartial justice. His failure to maintain his membership in the DC bar or to join the Utah bar raises doubts about his respect for the rule of law and his fitness for the bench.

---

[25] *See* Sunstein, et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, AEI-Brookings Joint Center for Regulatory Studies (2003) (available at http://aei-brookings.org/admin/pdffiles/php7m.pdf).

[26] These *en banc* decisions include: *Hoffman Plastic Compounds v. NLRB*, 237 F.3d 639 (DC Cir 2001), *rev'd* 122 S. Ct. 1275 (2002) (DC Circuit upheld 5-4 – with three Democrats and two Republicans in the majority and four Republicans in dissent – an NLRB order of reinstatement and backpay on behalf of undocumented worker fired by company for attempts to organize a union); *Kolstad v. American Dental Association*, 139 F. 3d 958 (DC Cir 1998), vacated 527 U.S. 526 (1999) (Court voted 6-5 – with all Republican appointees in the majority and all Democratic appointees in dissent – to limit punitive damages in a Title VII gender discrimination suit to cases in which plaintiff showed "egregious conduct." The Supreme Court vacated the decision, holding that the DC Circuit's articulated standard for awarding punitive damages was too harsh.); *Action for Children's Television v. FCC*, 58 F.3d 654 (DC Cir 1995) (By a vote of 7-4, with all Republicans in the majority and all Democratic appointees in dissent, the court upheld a ban in the Public Telecommunications Act on "indecent" material between the hours of 6 a.m. and 12 midnight.); *Steffan v. Perry*, 41 F.3d 677 (DC Cir 1994) (By a vote of 8-3, with seven Republicans and one Democrat in the majority and three Democrats in dissent, the Court upheld the discharge of a gay midshipmen based only on his statements that he was gay).

No judicial nominee is entitled to a presumption in favor of confirmation. Unless and until Mr. Griffith can provide answers that meaningfully resolve these concerns, the Alliance for Justice urges the Senate to reject his nomination.

AMERICAN
ASSOCIATION OF
UNIVERSITY
WOMEN

March 7, 2005

The Honorable Arlen Specter, Chair
Senate Judiciary Committee
711 Hart Building
Washington, D.C. 20510

The Honorable Patrick J. Leahy, Ranking Member
Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Opposition to the Nomination of Thomas Griffith to D.C. Circuit

Dear Senators Specter and Leahy:

On behalf of the more than 100,000 bipartisan members of the American Association of University Women (AAUW), we write to express our strong opposition to the nomination of Thomas B. Griffith to the U.S. Court of Appeals for the District of Columbia Circuit. Mr. Griffith's interpretation of current legal precedent suggests that he may find it difficult to enforce critical constitutional and statutory rights, particularly as they relate to Title IX of the Education Amendments of 1972.[1]

After careful consideration of his record, AAUW believes Mr. Griffith's publicly stated views on Title IX – especially as the law applies to athletics – have tainted his ability to impartially and independently apply established legal precedents on this issue. AAUW became well acquainted with Mr. Griffith's views on Title IX through his visible role on the Commission on Opportunity in Athletics. Mr. Griffith was one of the most outspoken members of the Commission, which was created in 2002 by Secretary of Education Rod Paige to evaluate whether and how current standards regulating Title IX's application to athletics should be revised. Mr. Griffith offered the most extreme proposal considered by the Commission – to eliminate prong one, the first option under Title IX's flexible three-prong test for determining compliance.[2] Under prong one, schools can comply with Title IX by demonstrating that the athletic opportunities for women and men are "substantially proportionate" to the gender breakdown of the school's enrollment. Mr. Griffith later described his own proposal – subsequently defeated by a

---

[1] Title IX bars sex discrimination in education programs or activities that receive federal funding, including athletics programs.

[2] Schools may use any one prong of Title IX's three-prong test to comply with the law: 1) Provide athletic opportunities to male and female students in proportion to their overall enrollment at the institution; or 2) Demonstrate a history of continually expanding athletic opportunities for the underrepresented sex; or 3) Demonstrate that the available opportunities meet the interests and abilities of the underrepresented sex.

Commission vote of 11 to 4[3] – as "radical,"[4] and noted that it "went down in flames."[5]

During the Commission hearings, Mr. Griffith also made some disparaging remarks about the circuit courts that have upheld the substantial proportionality prong and the three-prong test, comments that clearly and publicly conveyed his disagreement with both the courts' and the Department of Education's interpretation of Title IX and its enforcement provisions.

The Commission's proceedings make public Mr. Griffith's belief that the proportionality test is unreasonable, inconsistent with the language of Title IX, and a violation of the Equal Protection Clause. He openly dismissed the decisions of the eight circuit courts (every circuit that has considered the issue) that had rejected the very arguments he was making. Specifically, during the Washington, D.C. hearing of the Commission, Mr. Griffith stated, "No one is disputing that eight circuit courts have upheld the policy interpretations of the Department of Education."[6] He later asserted "the courts got it wrong."[7]

The July 11, 2003 final clarification letter issued at the close of the Commission process by the U.S. Department of Education's Office of Civil Rights (OCR) ultimately rejected the Commission's recommendations, leaving Title IX's three-prong test in place. The contents of the OCR letter confirmed just how far outside the mainstream Mr. Griffith's proposal was, when it stated: "First, with respect to the three-prong test, which has worked well, OCR encourages schools to take advantage of its flexibility, and to consider which of the three prongs best suits their individual situations. ... Each of the three prongs is thus a valid, alternative way for schools to comply with Title IX."[8] AAUW members are concerned that, if given a lifetime tenure on the D.C. Circuit, Mr. Griffith would be in a position to seriously undermine Title IX and jeopardize the progress it has made for women and girls across the country.

Mr. Griffith's analysis of Title IX regulations also raises significant concerns about his approach to other crucial elements of civil rights law. For example, his opposition to "numeric measures" even in sex-segregated settings (like athletics) clearly suggests Mr. Griffith may be equally resistant to numerical measures in other settings. These approaches could include affirmative action remedies for discrimination in employment or contracting, or statistical evidence to prove

---

[3] Transcript of January 30, 2003 hearing of the Commission on Opportunity in Athletics, p. 115
[4] Remarks at the 43rd Annual Conference of the National Association of College and University Attorneys, June 22, 2003.
[5] Transcript of January 30, 2003 hearing of the Commission on Opportunity in Athletics, p. 249.
[6] Transcript of the January 29, 2003 hearing of the Commission on Opportunity in Athletics p. 248.
[7] Transcript of the January 30, 2003 hearing of the Commission on Opportunity in Athletics, p. 27.
[8] Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance, a letter from Gerald Reynolds, Assistant Secretary for Civil Rights, U.S. Department of Education, July 11, 2003.

employment practices have a disparate, harmful impact on women or racial and ethnic minorities.

AAUW believes the country as a whole would be far better served by the nomination and confirmation of mainstream, moderate judges who will respect legal precedents such as those that protect civil and constitutional rights. These issues affect millions of Americans, yet the majority of such cases never reach the U.S. Supreme Court. As a result, the application of current legal precedent at the federal circuit court level is of critical importance in preserving these rights. AAUW believes the information available regarding Mr. Griffith's record raises serious concerns about whether he would approach the bench with the necessary neutrality and independence.

The D.C. Circuit Court is particularly significant, second only to the U.S. Supreme Court in influence over policy issues. It has exclusive jurisdiction over not only appeals from the D.C. District Courts, but also over some tax and federal regulatory agency appeals. It thus establishes precedent in areas that affect Americans in very significant ways. Unfortunately, in light of Mr. Griffith's performance on the Title IX Commission, AAUW believes he will find it difficult to enforce critical constitutional and statutory rights when they differ from his own well-defined, publicly stated views.

Lastly, AAUW believes that a nominee to a lifetime seat on the federal bench should be required to have the highest respect for the rule of law. Unfortunately, Mr. Griffith has repeatedly failed to comply with the rules that apply to his own membership in the Bar, violating the rules of his profession by practicing law in two different jurisdictions—the District of Columbia and Utah—without a valid license over a period of several years. For all these reasons, AAUW has no choice but to oppose Mr. Griffith's nomination.

AAUW urges you to oppose the confirmation of Thomas B. Griffith to the U.S. Court of Appeals for the District of Columbia Circuit. If you have any questions, please contact Lisa Maatz, Director of Public Policy and Government Relations, at 202/785-7720, or Cyndi Lucas, Government Relations Manager, at 202/785-7730.

Sincerely,

Nancy Rustad

Nancy Rustad
President

cc: Senate Judiciary Committee

1111 SIXTEENTH ST. NW, WASHINGTON, DC 20036 202/785-7700 FAX 202/872-1425
email: info@aauw.org http://www.aauw.org

AMERICAN
ASSOCIATION OF
UNIVERSITY
WOMEN

October 7, 2004

Re: Nomination of Thomas Griffith to D.C. Circuit

Dear Senator:

On behalf of the more than 100,000 bipartisan members of the American Association of University Women (AAUW), we write to express our opposition to the nomination of Thomas B. Griffith to the U.S. Court of Appeals for the District of Columbia Circuit. Mr. Griffith's interpretation of current legal precedent suggests that he may find it difficult to enforce critical constitutional and statutory rights, particularly as they relate to Title IX of the Education Amendments of 1972.[1]

After careful consideration of his record, AAUW believes Mr. Griffith's publicly stated views on Title IX – especially as the law applies to athletics – have tainted his ability to impartially and independently apply established legal precedents on this issue. AAUW became well acquainted with Mr. Griffith's views on Title IX through his visible role on the Commission on Opportunity in Athletics. Mr. Griffith was one of the most outspoken members of the Commission, which was created in 2002 by Secretary of Education Rod Paige to evaluate whether and how current standards regulating Title IX's application to athletics should be revised. Mr. Griffith offered the most extreme proposal considered by the Commission – to eliminate prong one, the first option under Title IX's flexible three-prong test for determining compliance.[2] Under prong one, schools can comply with Title IX by demonstrating that the athletic opportunities for women and men are "substantially proportionate" to the gender breakdown of the school's enrollment. Mr. Griffith later described his own proposal – subsequently defeated by a Commission vote of 11 to 4[3] – as "radical,"[4] and noted that it "went down in flames."[5]

During the Commission hearings, Mr. Griffith also had some disparaging things to say about the circuit courts that have upheld the substantial proportionality prong and the three-prong test, comments that clearly and publicly conveyed his

---

[1] Title IX bars sex discrimination in education programs or activities that receive federal funding, including athletics programs.
[2] Schools may use any one prong of Title IX's three-prong test to comply with the law: 1) Provide athletic opportunities to male and female students in proportion to their overall enrollment at the institution; or 2) Demonstrate a history of continually expanding athletic opportunities for the underrepresented sex; or 3) Demonstrate that the available opportunities meet the interests and abilities of the underrepresented sex.
[3] Transcript of January 30, 2003 hearing of the Commission on Opportunity in Athletics, p. 115
[4] Remarks at the 43rd Annual Conference of the National Association of College and University Attorneys, June 22, 2003.
[5] Transcript of January 30, 2003 hearing of the Commission on Opportunity in Athletics, p. 249.

1111 SIXTEENTH ST. NW, WASHINGTON, DC 20036 202/785-7700 FAX: 202/872-1425 TDD: 202/785-7777
e-mail: info@mail.aauw.org http://www.aauw.org

disagreement with both the courts' and the Department of Education's interpretation of Title IX and its enforcement provisions.

The Commission's proceedings make public Mr. Griffith's belief that the proportionality test is unreasonable, inconsistent with the language of Title IX, and a violation of the Equal Protection Clause. He openly dismissed the decisions of the eight Circuit Courts (every circuit that has considered the issue) that had rejected the very arguments he was making. Specifically, during the Washington, D.C. hearing of the Commission, Mr. Griffith stated, "No one is disputing that eight circuit courts have upheld the policy interpretations of the Department of Education."[6] He later asserted "the courts got it wrong."[7]

The July 11, 2003 final clarification letter issued at the close of the Commission process by the U.S. Department of Education's Office of Civil Rights (OCR) ultimately rejected the Commission's recommendations, leaving Title IX's three-prong test in place. The contents of the OCR letter confirmed just how far outside the mainstream Mr. Griffith's proposal was, when it stated: "First, with respect to the three-prong test, which has worked well, OCR encourages schools to take advantage of its flexibility, and to consider which of the three prongs best suits their individual situations. ... Each of the three prongs is thus a valid, alternative way for schools to comply with Title IX."[8] AAUW members are concerned that, if given a lifetime tenure on the D.C. Circuit, Mr. Griffith would be in a position to seriously undermine Title IX and jeopardize the progress it has made for women and girls across the country.

Mr. Griffith's analysis of Title IX regulations also raises significant concerns about his approach to other crucial elements of civil rights law. For example, his opposition to "numeric measures" even in sex-segregated settings (like athletics) – where they are simply a means of measuring discrimination in the allocation of opportunities – clearly suggests Mr. Griffith may be equally resistant to numerical measures in other settings. These approaches could include affirmative action remedies for discrimination in employment or contracting, or statistical evidence to prove employment practices have a disparate, harmful impact on women or racial and ethnic minorities.

AAUW believes the country as a whole would be far better served by the nomination and confirmation of mainstream, moderate judges who will respect legal precedents such as those that protect civil and constitutional rights. These issues affect millions of Americans, yet the majority of such cases never reach the U.S. Supreme Court. As a result, the application of current legal precedent at the federal circuit court level is of critical importance in preserving these rights. AAUW believes the information available regarding Mr. Griffith's record raises

---

[6] Transcript of the January 29, 2003 hearing of the Commission on Opportunity in Athletics p. 248.
[7] Transcript of the January 30, 2003 hearing of the Commission on Opportunity in Athletics, p. 27.
[8] Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance, a letter from Gerald Reynolds, Assistant Secretary for Civil Rights, U.S. Department of Education, July 11, 2003.

serious concerns about whether he would approach the bench with the necessary neutrality and independence.

The D.C. Circuit Court is particularly significant, second only to the U.S. Supreme Court in influence over policy issues. It has exclusive jurisdiction over not only appeals from the D.C. District Courts, but also over some tax and federal regulatory agency appeals. It thus establishes precedent in areas that affect Americans in very significant ways. Unfortunately, in light of Mr. Griffith's performance on the Title IX Commission, AAUW believes he will find it difficult to enforce critical constitutional and statutory rights when they differ with his own well-defined, publicly stated views. For all these reasons, AAUW has no choice but to oppose Mr. Griffith's nomination.

Another element of Mr. Griffith's record that is of concern to AAUW regards his law licensure problems. Mr. Griffith reportedly failed to pay his D.C. Bar dues from November 1998 to November 2001, and failed to become a member of the Utah Bar when he became the general counsel for Brigham Young University in August 2000. These failures raise serious questions about whether Mr. Griffith engaged in the unauthorized practice of law, a potentially serious ethical violation.

AAUW believes the integrity of the process should not be hastened or tainted by the agenda of either political party, and that no nominee is presumptively entitled to confirmation. Given that Congress is set to adjourn this week, as well as the fact that we are less than a month away from a presidential election, it would be highly unusual for the Senate Judiciary Committee to move on with the confirmation of a controversial, lifetime nominee. We strongly urge the Senate to conduct a thorough investigation of Mr. Griffith's record, including the Title IX concerns we have outlined above.

AAUW urges you to oppose the confirmation of Thomas B. Griffith to the U.S. Court of Appeals for the District of Columbia Circuit. If you have any questions, please contact Lisa Maatz, Director of Public Policy and Government Relations, at 202/785-7720, or Cyndi Lucas, Government Relations Manager, at 202/785-7730.

Sincerely,

Nancy Rustad
President

cc: Senate Judiciary Committee

1111 SIXTEENTH STREET, NW WASHINGTON, DC 20036 202/785-7700 FAX 202/872-1425
email: info@aauw.org web site: http://www.aauw.org

July 11, 2003

Dear Colleague:

It is my pleasure to provide you with this Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance.

Since its enactment in 1972, Title IX has produced significant advancement in athletic opportunities for women and girls across the nation. Recognizing that more remains to be done, the Bush Administration is firmly committed to building on this legacy and continuing the progress that Title IX has brought toward true equality of opportunity for male and female student-athletes in America.

In response to numerous requests for additional guidance on the Department of Education's (Department) enforcement standards since its last written guidance on Title IX in 1996, the Department's Office for Civil Rights (OCR) began looking into whether additional guidance on Title IX requirements regarding intercollegiate athletics was needed. On June 27, 2002, Secretary of Education Rod Paige created the Secretary's Commission on Opportunities in Athletics to investigate this matter further, and to report back with recommendations on how to improve the application of the current standards for measuring equal opportunity to participate in athletics under Title IX. On February 26, 2003, the Commission presented Secretary Paige with its final report, "Open to All: Title IX at Thirty," and in addition, individual members expressed their views.

After eight months of discussion and an extensive and inclusive fact-finding process, the Commission found very broad support throughout the country for the goals and spirit of Title IX. With that in mind, OCR today issues this Further Clarification in order to strengthen Title IX's promise of non-discrimination in the athletic programs of our nation's schools.

Title IX establishes that: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

In its 1979 Policy Interpretation, the Department established a three-prong test for compliance with Title IX, which it later amplified and clarified in its 1996 Clarification. The test provides that an institution is in compliance if 1) the intercollegiate-level participation opportunities for male and female students at the institution are "substantially proportionate" to their respective full-time undergraduate enrollments, 2) the institution has a "history and continuing practice of program expansion" for the underrepresented sex, or 3) the institution is "fully and effectively" accommodating the interests and abilities of the underrepresented sex.

First, with respect to the three-prong test, which has worked well, OCR encourages schools to take advantage of its flexibility, and to consider which of the three prongs best

suits their individual situations. All three prongs have been used successfully by schools to comply with Title IX, and the test offers three separate ways of assessing whether schools are providing equal opportunities to their male and female students to participate in athletics. If a school does not satisfy the "substantial proportionality" prong, it would still satisfy the three-prong test if it maintains a history and continuing practice of program expansion for the underrepresented sex, or if "the interests and abilities of the members of [the underrepresented] sex have been fully and effectively accommodated by the present program." Each of the three prongs is thus a valid, alternative way for schools to comply with Title IX.

The transmittal letter accompanying the 1996 Clarification issued by the Department described only one of these three separate prongs - substantial proportionality - as a "safe harbor" for Title IX compliance. This led many schools to believe, erroneously, that they must take measures to ensure strict proportionality between the sexes. In fact, each of the three prongs of the test is an equally sufficient means of complying with Title IX, and no one prong is favored. The Department will continue to make clear, as it did in its 1996 Clarification, that "[i]nstitutions have flexibility in providing nondiscriminatory participation opportunities to their students, and OCR does not require quotas."

In order to ensure that schools have a clear understanding of their options for compliance with Title IX, OCR will undertake an education campaign to help educational institutions appreciate the flexibility of the law, to explain that each prong of the test is a viable and separate means of compliance, to give practical examples of the ways in which schools can comply, and to provide schools with technical assistance as they try to comply with Title IX.

In the 1996 Clarification, the Department provided schools with a broad range of specific factors, as well as illustrative examples, to help schools understand the flexibility of the three-prong test. OCR reincorporates those factors, as well as those illustrative examples, into this Further Clarification, and OCR will continue to assist schools on a case-by-case basis and address any questions they have about Title IX compliance. Indeed, OCR encourages schools to request individualized assistance from OCR as they consider ways to meet the requirements of Title IX. As OCR works with schools on Title IX compliance, OCR will share information on successful approaches with the broader scholastic community.

Second, OCR hereby clarifies that nothing in Title IX requires the cutting or reduction of teams in order to demonstrate compliance with Title IX, and that the elimination of teams is a disfavored practice. Because the elimination of teams diminishes opportunities for students who are interested in participating in athletics instead of enhancing opportunities for students who have suffered from discrimination, it is contrary to the spirit of Title IX for the government to require or encourage an institution to eliminate athletic teams. Therefore, in negotiating compliance agreements, OCR's policy will be to seek remedies that do not involve the elimination of teams.

Third, OCR hereby advises schools that it will aggressively enforce Title IX standards, including implementing sanctions for institutions that do not comply. At the same time, OCR will also work with schools to assist them in avoiding such sanctions by achieving Title IX compliance.

Fourth, private sponsorship of athletic teams will continue to be allowed. Of course, private sponsorship does not in any way change or diminish a school's obligations under Title IX.

Finally, OCR recognizes that schools will benefit from clear and consistent implementation of Title IX. Accordingly, OCR will ensure that its enforcement practices do not vary from region to region.

OCR recognizes that the question of how to comply with Title IX and to provide equal athletic opportunities for all students is a challenge for many academic institutions. But OCR believes that the three-prong test has provided, and will continue to provide, schools with the flexibility to provide greater athletic opportunities for students of both sexes.

OCR is strongly reaffirming today its commitment to equal opportunity for girls and boys, women and men. To that end, OCR is committed to continuing to work in partnership with educational institutions to ensure that the promise of Title IX becomes a reality for all students. Thank you for your continuing interest in this subject.

Sincerely,

Gerald Reynolds
Assistant Secretary for Civil Rights

AMERICAN
ASSOCIATION OF
UNIVERSITY
WOMEN

June 17, 2004

Re: Nomination of Thomas Griffith to D.C. Circuit

Dear Senator:

On behalf of the more than 100,000 bipartisan members of the American Association of University Women (AAUW), we write to express our opposition to the nomination of Thomas B. Griffith to the U.S. Court of Appeals for the District of Columbia Circuit. Mr. Griffith's interpretation of current legal precedent suggests that he may find it difficult to enforce critical constitutional and statutory rights, particularly as they relate to Title IX of the Education Amendments of 1972.[1]

After careful consideration of his record, AAUW believes Mr. Griffith's publicly stated views on Title IX – especially as the law applies to athletics – have tainted his ability to impartially and independently apply established legal precedents on this issue. AAUW became well acquainted with Mr. Griffith's views on Title IX through his visible role on the Commission on Opportunity in Athletics. Mr. Griffith was one of the most outspoken members of the Commission, which was created in 2002 by Secretary of Education Rod Paige to evaluate whether and how current standards regulating Title IX's application to athletics should be revised. Mr. Griffith offered the most extreme proposal considered by the Commission – to eliminate prong one, the first option under Title IX's flexible three-prong test for determining compliance.[2] Under prong one, schools can comply with Title IX by demonstrating that the athletic opportunities for women and men are "substantially proportionate" to the gender breakdown of the school's enrollment. Mr. Griffith later described his own proposal – subsequently defeated by a Commission vote of 11 to 4[3] – as "radical,"[4] and noted that it "went down in flames."[5]

During the Commission hearings, Mr. Griffith also made disparaging remarks about the circuit courts that have upheld the substantial proportionality prong and

---

[1] Title IX bars sex discrimination in education programs or activities that receive federal funding, including athletics programs.

[2] Schools may use any one prong of Title IX's three-prong test to comply with the law: 1) Provide athletic opportunities to male and female students in proportion to their overall enrollment at the institution; or 2) Demonstrate a history of continually expanding athletic opportunities for the underrepresented sex; or 3) Demonstrate that the available opportunities meet the interests and abilities of the underrepresented sex.

[3] Transcript of January 30, 2003 hearing of the Commission on Opportunity in Athletics, p. 115

[4] Remarks at the 43rd Annual Conference of the National Association of College and University Attorneys, June 22, 2003.

[5] Transcript of January 30, 2003 hearing of the Commission on Opportunity in Athletics, p. 249.

1111 SIXTEENTH ST. NW, WASHINGTON, DC 20036 202/785-7700 FAX: 202/872-1425 TDD: 202/785-7777
e-mail: info@mail.aauw.org http://www.aauw.org

AMERICAN
ASSOCIATION OF
UNIVERSITY
WOMEN

the three-prong test, comments that clearly and publicly conveyed his disagreement with both the courts' and the Department of Education's interpretation of Title IX and its enforcement provisions.

The Commission's proceedings make public Mr. Griffith's belief that the proportionality test is unreasonable, inconsistent with the language of Title IX, and a violation of the Equal Protection Clause. He openly dismissed the decisions of the eight circuit courts (every circuit that has considered the issue) that had rejected the very arguments he was making. Specifically, during the Washington, D.C. hearing of the Commission, Mr. Griffith stated, "No one is disputing that eight circuit courts have upheld the policy interpretations of the Department of Education."[6] He later asserted "the courts got it wrong."[7]

The July 11, 2003 final clarification letter issued at the close of the Commission process by the U.S. Department of Education's Office of Civil Rights (OCR) ultimately rejected the Commission's recommendations, leaving Title IX's three-prong test in place. The contents of the OCR letter confirmed just how far outside the mainstream Mr. Griffith's proposal was, when it stated: "First, with respect to the three-prong test, which has worked well, OCR encourages schools to take advantage of its flexibility, and to consider which of the three prongs best suits their individual situations. ... Each of the three prongs is thus a valid, alternative way for schools to comply with Title IX."[8] AAUW members are concerned that, if given a lifetime tenure on the D.C. Circuit, Mr. Griffith would be in a position to seriously undermine Title IX and jeopardize the progress it has made for women and girls across the country.

Mr. Griffith's analysis of Title IX regulations also raises significant concerns about his approach to other crucial elements of civil rights law. For example, his opposition to "numeric measures" even in sex-segregated settings (like athletics) – where they are simply a means of measuring discrimination in the allocation of opportunities – clearly suggests Mr. Griffith may be equally resistant to numerical measures in other settings. These approaches could include affirmative action remedies for discrimination in employment or contracting, or statistical evidence to prove employment practices have a disparate, harmful impact on women or racial and ethnic minorities.

AAUW believes the country as a whole would be far better served by the nomination and confirmation of mainstream, moderate judges who will respect legal precedents such as those that protect civil and constitutional rights. These

---

[6] Transcript of the January 29, 2003 hearing of the Commission on Opportunity in Athletics p. 248.
[7] Transcript of the January 30, 2003 hearing of the Commission on Opportunity in Athletics, p. 27.
[8] Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance, a letter from Gerald Reynolds, Assistant Secretary for Civil Rights, U.S. Department of Education, July 11, 2003.

1111 SIXTEENTH ST. NW, WASHINGTON, DC 20036 202/785-7700 FAX: 202/872-1425 TDD: 202/785-7777
e-mail: info@mail.aauw.org http://www.aauw.org

AMERICAN
ASSOCIATION OF
UNIVERSITY
WOMEN

issues affect millions of Americans, yet the majority of such cases never reach the U.S. Supreme Court. As a result, the application of current legal precedent at the federal circuit court level is of critical importance in preserving these rights. AAUW believes the information available regarding Mr. Griffith's record raises serious concerns about whether he would approach the bench with the necessary neutrality and independence.

The D.C. Circuit Court is particularly significant, second only to the U.S. Supreme Court in influence over policy issues. It has exclusive jurisdiction over not only appeals from the D.C. District Courts, but also over some tax and federal regulatory agency appeals. It thus establishes precedent in areas that affect Americans in very significant ways. Unfortunately, in light of Mr. Griffith's performance on the Title IX Commission, AAUW believes he will find it difficult to enforce critical constitutional and statutory rights when they differ with his own well-defined, publicly stated views. For all these reasons, AAUW has no choice but to oppose Mr. Griffith's nomination.

AAUW believes the integrity of the judicial nomination process should not be hastened or tainted by the agenda of either political party, and that no nominee is presumptively entitled to confirmation. We strongly urge the Senate to conduct a thorough investigation of Mr. Griffith's record, including the Title IX concerns we have outlined above. We also urge the Committee to refrain from passing judgment on his nomination until that inquiry—and his American Bar Association (ABA) rating—is complete. Only then can a full and informed decision be made on this important, lifetime appointment.

AAUW urges you to oppose the confirmation of Thomas B. Griffith to the U.S. Court of Appeals for the District of Columbia Circuit. If you have any questions, please contact Lisa Maatz, Director of Public Policy and Government Relations, at 202/785-7720, or Lynsey Morris, Government Relations Manager, at 202/785-7730.

Sincerely,

Nancy Rustad
President

Jacqueline E. Woods
Executive Director

cc: Senate Judiciary Committee

1111 SIXTEENTH ST. NW, WASHINGTON, DC 20036 202/785-7700 FAX: 202/872-1425 TDD: 202/785-7777
e-mail: info@mail.aauw.org http://www.aauw.org

AMERICAN
ASSOCIATION OF
UNIVERSITY
WOMEN

June 1, 2004

The Honorable Orrin Hatch, Chair
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy, Ranking Member
Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, DC 20510

Re: Nomination of Thomas Griffith to D.C. Circuit

Dear Chairman Hatch and Senator Leahy:

On behalf of the more than 100,000 bipartisan members of the American Association of University Women (AAUW), we write to express our serious concern regarding the nomination of Thomas B. Griffith to the U.S. Court of Appeals for the District of Columbia Circuit. Mr. Griffith's interpretation of current legal precedent suggests that he may find it difficult to enforce critical constitutional and statutory rights, particularly as they relate to Title IX of the Education Amendments of 1972.[1] We urge the Committee to thoroughly review this nominee's record and to obtain and examine all relevant information on Mr. Griffith before making a decision on his confirmation.

After careful consideration of his record, AAUW is concerned that Mr. Griffith's publicly stated views on Title IX – especially as the law applies to athletics – have tainted his ability to impartially and independently apply established legal precedents on this issue. AAUW became well acquainted with Mr. Griffith's views on Title IX through his visible role on the Commission on Opportunity in Athletics. Mr. Griffith was one of the most outspoken members of the Commission, which was created in 2002 by Secretary of Education Rod Paige to evaluate whether and how current standards regulating Title IX's application to athletics should be revised. Mr. Griffith offered the most extreme proposal considered by the Commission – to eliminate prong one, the first option under Title IX's flexible three-prong test for determining compliance.[2] Under prong one,

[1] Title IX bars sex discrimination in education programs or activities that receive federal funding, including athletics programs.

[2] Schools may use any one prong of Title IX's three-prong test to comply with the law: 1) Provide athletic opportunities to male and female students in proportion to their overall enrollment at the institution; or 2)

schools can comply with Title IX by demonstrating that the athletic opportunities for women and men are "substantially proportionate" to the gender breakdown of the school's enrollment. Mr. Griffith described his own proposal – subsequently defeated by a Commission vote of 11 to 4[3] – as "radical," and noted that it "went down in flames."[4]

During the Commission hearings, Mr. Griffith also had some disparaging things to say about the circuit courts that have upheld the substantial proportionality prong and the three-prong test, comments that clearly and publicly conveyed his disagreement with both the courts' and the Department of Education's interpretation of Title IX and its enforcement provisions.

The Commission's proceedings make public Mr. Griffith's belief that the proportionality test is unreasonable, inconsistent with the language of Title IX, and a violation of the Equal Protection Clause. He openly dismissed the decisions of the eight Circuit Courts (every circuit that has considered the issue) that had rejected the very arguments he was making. Specifically, during the Washington, D.C. hearing of the Commission, Mr. Griffith stated, "No one is disputing that eight circuit courts have upheld the policy interpretations of the Department of Education."[5] He later asserted "the courts got it wrong."[6]

The July 11, 2003 final clarification letter issued at the close of the Commission process by the U.S. Department of Education's Office of Civil Rights (OCR) ultimately rejected the Commission's recommendations, leaving Title IX's three-prong test in place. The contents of the OCR letter confirmed just how far outside the mainstream Mr. Griffith's proposal was, when it stated: "First, with respect to the three-prong test, which has worked well, OCR encourages schools to take advantage of its flexibility, and to consider which of the three prongs best suits their individual situations. ... Each of the three prongs is thus a valid, alternative way for schools to comply with Title IX."[7]

AAUW members are concerned that, if given a lifetime tenure on the D.C. Circuit, Mr. Griffith would be in a position to seriously undermine Title IX and jeopardize the progress it has made for women and girls across the country. We believe the information available regarding Mr. Griffith's record raises serious

---

Demonstrate a history of continually expanding athletic opportunities for the underrepresented sex; or 3) Demonstrate that the available opportunities meet the interests and abilities of the underrepresented sex.

[3] Transcript of January 30, 2003 hearing of the Commission on Opportunity in Athletics, p. 115

[4] Transcript of January 30, 2003 hearing of the Commission on Opportunity in Athletics, p. 249.

[5] Transcript of the January 29, 2003 hearing of the Commission on Opportunity in Athletics p. 248.

[6] Transcript of the January 30, 2003 hearing of the Commission on Opportunity in Athletics, p. 27.

[7] Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance, a letter from Gerald Reynolds, Assistant Secretary for Civil Rights, U.S. Department of Education, July 11, 2003.

concerns about whether he is an appropriate candidate for a lifetime appointment to this nation's second most powerful federal court.

AAUW believes the country as a whole would be far better served by the nomination and confirmation of mainstream, moderate judges who will respect legal precedents such as those that protect civil and constitutional rights. These issues affect millions of Americans, yet the majority of such cases never reach the U.S. Supreme Court. As a result, AAUW believes the application of current legal precedent at the federal circuit court level is of critical importance in preserving these rights.

The D.C. Circuit Court is particularly significant, second only to the U.S. Supreme Court in influence over policy issues. It has exclusive jurisdiction over not only appeals from the D.C. District Courts, but also over some tax and federal regulatory agency appeals. It thus establishes precedent in areas that affect Americans in very significant ways. Unfortunately, in light of Mr. Griffith's performance on the Title IX Commission, AAUW is very concerned that he will find it difficult to enforce critical constitutional and statutory rights when they differ with his own well-defined, publicly stated views.

AAUW strongly urges the members of the Judiciary Committee to conduct a thorough investigation of Mr. Griffith's record, including the Title IX concerns we have outlined above. We also urge the Committee to refrain from passing judgment on his nomination until that inquiry—and the record—is complete. Only then can a full and informed decision be made on this important, lifetime appointment.

If you have any questions, please contact Lisa Maatz, Director of Public Policy and Government Relations, at 202/785-7720, or Lynsey Mortis, Government Relations Manager, at 202/785-7730.

Sincerely,

Nancy Rustad
President

Jacqueline E. Woods
Executive Director

cc: Senate Judiciary Committee

1111 SIXTEENTH ST. NW, WASHINGTON, DC 20036 202/785-7700 FAX 202/872-1425
email: info aauw.org http://www.aauw.org

Dawk

ShawPittman LLP

A Limited Liability Partnership Including Professional Corporations

WALTER J. ANDREWS
703.770.7642
walter.andrews@shawpittman.com

June 22, 2004

VIA FACSIMILE

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

I write to inform the Senate Judiciary Committee of my strong support for the judicial nomination of Thomas Griffith to the United States Court of Appeals for the District of Columbia Circuit. I have known Tom for over 15 years and cannot think of anyone who has more integrity and character and is better qualified to sit on this Court. Through our professional association, I am intimately familiar with Tom's litigation experience and abilities.

Tom first worked with me as an associate at Wiley, Rein & Fielding and, later, I had the privilege to be his partner, at the same firm. Tom's approach to the practice of law always invoked the highest ethical and professional standards and he was a role model for those who strived to practice with such a degree of integrity and professionalism.

I have since left Wiley, Rein & Fielding, and am now a partner and Co-Chair of the Litigation Practice, at Shaw Pittman, but I have stayed in touch with and followed Tom's career, and my confidence in and respect for his abilities and strength of character have not changed. I wholeheartedly support his nomination and urge the Committee to do the same.

If I can be of any assistance to the Committee in this process, by answering any questions or providing any additional details, please do not hesitate to contact me.

Sincerely yours,

Walter J. Andrews

Walter J. Andrews

cc: The Honorable Patrick J. Leahy (via facsimile)
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510
202-224-9516

Office of Legal Policy (via facsimile)
United States Department of Justice
202-514-5715

June 27, 2004

via facsimile: 202-228-1698

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: C nfirmation of Thomas Griffith to the U.S. Court of Appeals for the D.C. Circuit

Dear Mr. Chairman:

I write to support the confirmation of Thomas Griffith as a judge on the D.C. Circuit Court of Appeals. I am a professor of law at the J. Reuben Clark Law School, Brigham Young University, where, among other classes, I teach courses in feminist legal theory and race and race relations. My research centers primarily around gender and citizenship issues. Prior to becoming a law professor, I practiced administrative law with Covington & Burling in Washington, D.C. for three years. In 1992, I graduated *magna cum laude* from Harvard Law School.

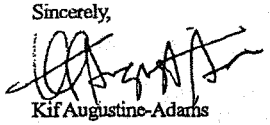
I have known Tom in both personal and professional capacities since the summer of 1990, in North Carolina, Washington D.C., and Utah. With more than a decade of interaction in mind and my feminist convictions at heart, I can best describe Tom as fair. His commitment to fairness is exactly what will make him an excellent judge as he patiently and openly listens to the cases and issues presented to him. On numerous occasions, Tom has been instrumental in bringing to the J. Reuben Clark Law School different speakers, including Gregory Craig, former White House Special Counsel during the Clinton impeachment, and most of the still-living individuals who served as Solicitor General of the United States. I have been impressed by the wide range of view points those speakers represent and their unequivocal respect for Tom, despite their differing political views. Tom engages both people and ideas with uncommon fairness and respect.

Tom and I have differing views on some significant political issues, which should make my endorsement of him particularly valuable. Whatever our political differences, I am convinced that Tom will be a judge who carefully engages with the issues before him. I am convinced of that both because of my long interaction with him and because of the people with whom Tom chooses to associate. In his service to our shared religious community, Tom has the opportunity to staff various organizations with individuals of his choosing. He chose a tough-minded feminist to serve with him. He chose a professor with

significant liberal commitments to serve with him. Tom sought out individuals with independent minds and spirits and excellent credentials rather than those who would simply agree with him. He will offer the same equal opportunity as a judge, both in the cases he hears and to the people he hires. When equal opportunity issues have arisen on campus, I have felt completely comfortable calling Tom directly to express my thoughts and concerns. He listens, evaluates, and acts with good judgment.

If I can be of any further assistance in supporting Tom's confirmation to the D.C. Circuit Court of Appeals, I would be happy to do so.

Sincerely,



Kif Augustine-Adams
Professor of Law
J. Reuben Clark Law School
Brigham Young University
Provo, UT 84602
Voice (801) 422-3712
Fax (801) 422-0390

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510
via facsimile: 202-224-9516

Office of Legal Policy
United States Department of Justice
Main Justice Building
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001
via facsimile: 202-514-5715

Utah State Bar

645 South 200 East, Suite 310 • Salt Lake City, Utah 84111-3834
Telephone: 801-531-9077 • 1-800-698-9077 • Fax: 801-531-0660

July 2, 2004

Hon. Orrin G. Hatch
Chairman, Judiciary Committee
United States Senate
224 Dirksen Senate Office Building
Washington, D. C. 20510

Via Fax: 202-228-1698

Dear Senator Hatch,

I am writing to confirm representations made by this office in response to inquiries regarding our policy on the appropriateness of activities engaged in by persons acting as general counsel in the state who are otherwise not licensed to practice law in Utah.

Those who engage in the practice of law in Utah must be licensed by the Utah Supreme Court through the Utah State Bar. There is no general counsel exception rule which allows persons who serve in such positions to practice law without licensure. We are aware of the variety of duties performed by persons who engage in general counsel activities and understand that the duties they regularly perform may or may not actually involve the type of advice or counsel which would constitute what has historically been interpreted as the practice of law.

To those general counsel who cannot avoid circumstances which approach or may cross that line, we have consistently advised that under such circumstances they should directly associate with lawyers who are licensed in the state and on active status. Our policy has also consistently been that those who follow that advice are not engaged in the unauthorized practice of law.

Sincerely,

John C. Baldwin
Executive Director

cc: Debra J. Moore, President
U.S. Department of Justice Office of Legal Policy

Thurnes\jcb\bach

June 28, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United State Senate
224 Dirksen Senate Office Building
Washington, D. C. 20510

RE: Thomas Griffith, Esq., Nominee

Dear Mr. Chairman:

It is with a sense of responsibility and honor that this letter supporting the nomination of Thomas Griffith to the United States Court of Appeals for the District of Columbia is written. Having worked in D.C. for approximately ten years, the last four at the Supreme Court of the United States, I realize the importance of this appointment to the D.C. Court of Appeals. It is also with a knowledge of the long hours that justices spend in the decision-making process that I send this recommend.

Mr. Griffith is a man of outstanding moral character who has served in a number of legal positions with dedication and commitment. His service to the United States Senate as legal counsel is commendable. He has filled other professional assignments with equal dedication. My association with Mr. Griffith has been since he came to Brigham Young University as its General Counsel, a little less than four years ago. Since that time, he has been involved in the Human Resources/General Counsel monthly meeting, where issues facing all segments of the BYU campus community are discussed. He has been vocal in his support of Title VII of the Civil Rights Act and of Title IX of the Education Amendments. His standard is to be fair and to be conscientious in the review of all issues. He is committed to resolving positively those issues surrounding discrimination, especially those involving women and minorities,

I appreciate this opportunity to give my support to Mr. Griffith. Should you or any member of the committee desire to contact me for further information, I can be reached at 801-422-6878 or by fax at 202-422-0306. My email address is delora-bertelsen@byu.edu.

Sincerely,

Delora Bertelsen

Delora P. Bertelsen
Managing Director
Employee Relations and Equal Opportunity
Brigham Young University

CC: The Honorable Patrick J. Leahy, Ranking Member of the Committee on the Judiciary
Office of legal Policy

IOWA HAWKEYES

The University of Iowa
Carver-Hawkeye Arena
Iowa City, IA 52242-1020

July 9, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

I am writing to you to support the nomination of Thomas Griffith to the United States Court of Appeals for the District of Columbia. I had the good fortune to serve with Mr. Griffith on the Commission on Opportunities in Athletics which was appointed by Secretary Paige.

During more than a year of frequent meetings and hearings, I came to admire Mr. Griffith's insight as well as his wisdom. Tom is very committed to equal access, equal opportunity and to all of the principles which are embodied in Title IX. I also found Tom to be highly devoted to ensuring that the intentions of the authors of the law were not misinterpreted.

I believe that Tom's role as the father of five daughters provided the basis for his fervent desire to guarantee fairness, however, he also understands that equitable treatment must extend to all who are affected by the law.

I have found Mr. Griffith to be considerate, thoughtful and open-minded in his review of potential outcomes. Further I believe that Mr. Griffith contributed significantly to the dialog regarding Title IX and was instrumental in shaping the eventual report which forwarded 15 recommendations that were unanimously adopted by the Commission. Mr. Griffith is exceptionally committed to the preservation of the progress which Title IX has afforded and to the advancement of equal opportunity for all Americans.

I would be happy to provide further information if requested by you or your committee.

Sincerely,

Robert A. Bowlsby
Director

RAB/mo

Wiley Rein & Fielding LLP

1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000
FAX 202.719.7049

Virginia Office
7925 JONES BRANCH DRIVE
SUITE 6200
McLEAN, VA 22102
PHONE 703.905.2800
FAX 703.905.2820

www.wrf.com

June 22, 2004

Thomas W. Brunner
202.719.7225
tbrunner@wrf.com

VIA FACSIMILE

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Hatch:

I am writing to endorse in the strongest possible terms the nomination of Thomas B. Griffith, Esquire to the United States Court of Appeals for the District of Columbia Circuit. I worked with Tom Griffith for many years at Wiley, Rein & Fielding as hands-on litigating lawyers working together on large commercial lawsuits. He and I exchanged ideas, edited each others drafts and jointly formulated strategy on numerous cases. I know Tom to be an exceptional lawyer, energetic, dynamic and intelligent in the representation of his client but simultaneously thoughtful, careful and judicious. He is also a caring, engaged member of the larger community and served as a committed member of our law firm -- and of all of the institutions he has ably served. He would be a credit to an already distinguished bench on the DC Circuit.

I offer these views from the perspective of a life-long and politically active Democrat. While Tom and I don't always agree on partisan political issues, I have the highest regard for his integrity and for his open-mindedness. As a judge, he would approach each case without prejudice, with a willingness to be educated about considerations he did not previously understand and a rock-solid commitment to fairness. He is precisely the kind of legitimately Republican, thoroughly distinguished and philosophically mainstream judicial nominee that the country should receive from this White House -- and regrettably in some instances has not.

Wiley Rein & Fielding LLP

Please let me know if I can provide any further information.

Thank you for considering my views.

Sincerely,

Thomas W. Brunner/jp

Thomas W. Brunner

cc: The Honorable Patrick J. Leahy (via facsimile)
Office of Legal Policy (via facsimile)

Helms Mulliss & Wicker, PLLC Attorneys at Law
Charlotte Raleigh Wilmington www.hmw.com

HELMS MULLISS WICKER

direct: (704) 343-2196
fax: (704) 343-2300
jack.cobb@hmw.com

201 North Tryon Street
Charlotte, NC 28202
P.O. Box 31247 (28231)
704.343.2000
f704.343.2300

June 18, 2004

VIA FACSIMILE (202-228-1698)
The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

I am writing in support of Thomas D. Griffith's nomination to the United States Court of Appeals for the District of Columbia. By his temperament, acumen, and integrity, Tom is extraordinarily well qualified for the position, and I hope the Committee will act expeditiously on his nomination.

I have known Tom for nearly fifteen years and have at different times been both a colleague and client of his. We first worked together in a Charlotte, North Carolina law firm many years ago. More recently, while he served as the Senate Legal Counsel, I was a frequent client of Tom's as an attorney for the Senate's Permanent Subcommittee on Investigations and then the Governmental Affairs Committee. I turned to Tom and his office for assistance on many issues, including enforcement and interpretation of Committee subpoenas, extraordinary writs to secure the testimony of incarcerated witnesses, and testimonial privileges asserted by witnesses. Tom always provided fair, timely, thoughtful, and good advice. I might add that Tom is a delightful, welcoming friend. In short, Tom is an unusually well-qualified candidate professionally and personally.

Though I am five years now removed from Capitol Hill, I recall that Presidential election years can create problems for the consideration of appellate court nominees. I am delighted, therefore, that the Committee is scheduled to hold a hearing soon on Tom's nomination, and I

urge the Committee to vote Tom's nomination out promptly thereafter. It would be an unfortunate irony if factors unrelated to his many merits held up the nomination of someone who served the Senate so faithfully and well.

Very truly yours,

HELMS MULLISS & WICKER, PLLC

John H. Cobb

cc (via facsimile):

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510
202.224.9516

Office of Legal Policy
United States Department of Justice
Washington, DC
202.514.5715

COMMUNITY RIGHTS COUNSEL
EARTHJUSTICE

November 15, 2004

The Honorable Orrin Hatch
Chairman, Senate Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Patrick Leahy
Ranking Member, Senate Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: Nomination of Thomas B. Griffith to a Lifetime Position on the U.S. Court of Appeals for the District of Columbia Circuit

Dear Chairman Hatch and Ranking Member Leahy:

As you review and decide upon the nomination of Thomas B. Griffith to a lifetime position on the United States Court of Appeals for the District of Columbia Circuit, please consider the attached letter and include it in the record of the Committee on the Judiciary and the Senate. This attached September 23, 2002 letter[1] explains, on behalf of the more than one million members of 16 national environmental organizations, how the D.C. Circuit's unique jurisdiction makes the court the second most powerful environmental court in the country, surpassed only by the Supreme Court; and expresses the affirmative standards that the Senate should apply in exercising its constitutional advise-and-consent responsibility for judicial nominations.

On behalf of Community Rights Counsel and Earthjustice, we also encourage the Senate to review fully and carefully whether, during the last six years, Mr. Griffith has inappropriately disregarded his obligation to maintain an active law license in the jurisdictions in which he practiced, and whether he has practiced law without a valid license. Particularly with respect to a nominee to the DC Circuit, these considerations raise serious issues that should be fully explored in the Senate confirmation process.

[1] September 23, 2002 letter from Community Rights Counsel, Defenders Of Wildlife, Earthjustice, Endangered Species Coalition, Environmental Defense, Environmental Working Group, Friends of the Earth, National Environmental Trust, Natural Resources Defense Council, Oceana, Physicians for Social Responsibility, Scenic America, Sierra Club, Southern Utah Wilderness Alliance, U.S. Public Interest Research Group, and The Wilderness Society to The Honorable Charles E. Schumer, Chair, Judiciary Subcommittee on Administrative Oversight and the Courts, regarding the Subcommittee's hearing on "The D.C. Circuit: The Importance of Balance on the Nation's Second Highest Court."

1625 MASSACHUSETTS AVE., NW, SUITE 702 WASHINGTON, DC 20036-2243
T: 202.667.4500 F: 202.667.2356 E: eajusdc@earthjustice.org W: www.earthjustice.org

Thank you for consideration of our views on this nomination to a lifetime seat on this critically important court of appeals.

Sincerely yours,

Doug Kendall
Executive Director
Community Rights Counsel

Glenn P. Sugameli
Senior Legislative Counsel
Earthjustice

Attachment

CC: Members, Senate Committee on the Judiciary

COMMUNITY RIGHTS COUNSEL · DEFENDERS OF WILDLIFE
EARTHJUSTICE · ENDANGERED SPECIES COALITION
ENVIRONMENTAL DEFENSE · ENVIRONMENTAL WORKING GROUP
FRIENDS OF THE EARTH · NATIONAL ENVIRONMENTAL TRUST
NATURAL RESOURCES DEFENSE COUNCIL · OCEANA
PHYSICIANS FOR SOCIAL RESPONSIBILITY · SCENIC AMERICA
SIERRA CLUB · SOUTHERN UTAH WILDERNESS ALLIANCE
U.S. PUBLIC INTEREST RESEARCH GROUP
THE WILDERNESS SOCIETY

September 23, 2002

The Honorable Charles E. Schumer, Chair
Judiciary Subcommittee on
Administrative Oversight and the Courts
United States Senate
Washington, DC 20510

RE: Hearing on "The DC Circuit: The Importance of Balance on the Nation's Second Highest Court."

Dear Senator Schumer:

On behalf of the more than one million members of the national environmental organizations listed above, we are writing to thank you for holding this important hearing on the importance of balance on the U.S. Court of Appeals for the District of Columbia Circuit.

In July 2001, many of us wrote to you and other members of the Senate Judiciary Committee urging careful scrutiny of the environmental record and views of nominees for lifetime positions on the federal judiciary. The judges appointed to the federal bench over the next few years will dramatically affect the level of public health and welfare and environmental protection in this country for several decades. We explained that environmental protections long thought secure are now in jeopardy in the federal courts. Certain federal judges have been too willing to place their own personal policy preferences above the intent of Congress as expressed in our landmark environmental statutes like the Clean Water Act and the Clean Air Act. A few more judges out of this mold will tip the balance in courts across the country and roll the clock back further on important national environmental protections.

These concerns are particularly important when it comes to appointments to the DC Circuit. The DC Circuit is empowered to hear most cases challenging environmental rulings and regulations issued by the Environmental Protection Agency (EPA), the Department of the Interior, and other executive branch agencies. This unique jurisdiction makes the court the second most powerful environmental court in the country, surpassed only by the Supreme Court.

Today, the DC Circuit is a deeply divided court. This divide is illustrated by the razor-thin margin by which the court declined to review a panel ruling in *American Trucking Association v. EPA,* 175 F.3d 1027 (1999), that struck down Clean Air Act protections against soot and smog promulgated by EPA to prevent an estimated 15,000 premature deaths each year. As the panel dissent pointed out, the Court's ruling ignored "the last half-century of Supreme Court nondelegation jurisprudence." Indeed, the panel was reversed in 2001 by a unanimous Supreme Court.

The DC Circuit is also an increasingly unreceptive forum for environmental plaintiffs. A recent empirical study conducted by Professors Christopher Schroeder and Robert Glicksman found that in the 1990's pro-industry claimants experienced a five-fold increase in their success in challenging EPA's scientific decision making. Over the same period environmental claimants saw their success rate decrease by 20%. (For more on these cases and these statistics see the enclosed chapter on the DC Circuit from a report entitled *Hostile Environment: How Activist Federal Judges Threaten Our Air, Water, and Land*).

With 4 vacancies on the twelve member DC Circuit, President Bush has a historic opportunity to shape this critical court. We have urged the President to honor his promise to nominate judges who will respect the constitutionally mandated judicial function of interpreting—rather than making—the law.

The Senate's constitutional advice and consent role is as important as the President's in filling vacancies in the third branch of government, the judiciary. We believe that, in carrying out that role, the Senate must ensure that judicial nominees are subject to the highest standard of scrutiny and, at a minimum, should be required to demonstrate the qualities of integrity, wisdom, fairness, compassion and judicial temperament. Accordingly, we urge you to vote to confirm only those nominees who:

1. Demonstrate a respect for the policy decisions made by elected representatives to protect the public health and welfare and our natural resources as reflected in our environmental laws;
2. Demonstrate superior qualifications for the position;
3. Bring an objective, balanced approach to decision-making; and
4. Demonstrate a commitment to protecting the rights of ordinary people and do not improperly elevate the interests of the powerful over those of individual citizens.

We also urge you to ensure that each nominee affirmatively establish his or her qualifications for the critical and esteemed position of federal judge. No President has a mandate to appoint to the federal courts judges who are or may be hostile to laws protecting the environment and the public's health and welfare. The mere absence of disqualifying evidence in a nominee's record should not constitute sufficient grounds for confirmation.

We strongly urge you to reject any nominee who would place his or her own personal policy preferences above the explicit Congressional mandates for protection embodied in our environmental laws. Thank you again for holding this timely and important hearing and for considering our views on the DC Circuit.

Sincerely,

Doug Kendall
Executive Director
Community Rights Counsel

Martin Hayden
Legislative Director
Earthjustice

John R. Bowman
Legislative Counsel
Environmental Defense

Sara Zdeb
Legislative Director
Friends of the Earth

Alyssondra Campaigne
Legislative Director
Natural Resources Defense Council

Karen Hopfl-Harris
Legislative Director/Staff Attorney
Environment and Health Program
Physicians for Social Responsibility

Pat Gallagher
Director, Sierra Club Environmental Law Program
Sierra Club

Anna Aurilio
Legislative Director
U.S. Public Interest Research Group

William Snape
Vice President of Law and Litigation
Defenders of Wildlife

Beth Lowell
Policy Analyst
Endangered Species Coalition

Richard Wiles
Senior Vice President
Environmental Working Group

Kevin S. Curtis
Vice President, Government Affairs
National Environmental Trust

Ted Morton
Federal Policy Director
Oceana

Meg Maguire
President
Scenic America

Larry Young
Executive Director
Southern Utah Wilderness Alliance

Leslie Jones
Staff Attorney
The Wilderness Society

the global voice of the legal professio

The Honorable Orrin G Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

June 22, 2004

Dear Mr Chairman

I am an American citizen living in London. I am a registered democrat and view myself as a moderate liberal. As a U.S. lawyer, I maintain a keen interest in our country's judicial and legislative process. As Executive Director of the International Bar Association (IBA), I watch these same developments from the perspective of the international community. Thus, the appointment of a judge to the U.S. Court of Appeals for the District of Columbia Circuit, viewed by many as the most influential federal court, is of immense importance to me.

With this background in mind, I am honored to write this letter in support of the nomination of Thomas Griffith to the DC Circuit Court. I have known Tom for over ten years and worked with him directly when I was Executive Director of the American Bar Association's Central and East European Law Initiative (CEELI) and he served on CEELI's Advisory Board. During my association with Tom while in Washington DC, I came to know him as an extraordinary person in so many ways. Tom's honesty was irreproachable and his sense of fairness when dealing with people was inspiring.

In a political environment defined more by pernicious attacks and acrimonious debate, Tom Griffith always strives for a different approach. Rather than eschew diversity, Tom embraces it. Instead of disregarding opposing views, he listens to them. While others erect walls that reinforce political division, Tom builds bridges that lead to greater understanding and acceptance. He is neither verbose nor belligerent and his self-effacing attitude easily disarms people. These characteristics are immeasurable.

People instinctively trust Tom Griffith as a person and they will respect him as a judge. Citizens of different economic backgrounds, religions, ethnic groups, and political convictions will consent to his judicial authority, not because of the power of his position, but because of his unwavering commitment to what is just and lawful. The duty of a judge is to administer justice according to law, without fear or favor, and without regard to the wishes or policy of the governing majority. Tom Griffith will fervently adhere to this principle. As is natural in a democracy, people will not always agree with Tom's decisions from the bench. I will certainly not always agree with those decisions. However, there will never be a question as to the veracity behind them. I suspect for any judge, this type of acknowledgement by so many would be the pinnacle of his or her judicial career. There is no doubt in my mind that Tom will achieve this milestone.

Tom Griffith will make an unprecedented contribution to our country as a judge and if moral principle is the foundation of law, then he will serve it well.

Please do not hesitate to contact me if I can provide you with any further insight regarding Tom's nomination.

Sincerely,

Mark S. Ellis
Executive Director
International Bar Association

cc The Honorable Patrick J. Leahy

Office of Legal Policy, United States Department of Justice

KATHY D. PULLINS
Associate Dean
J. Reuben Clark Law School

BRIGHAM YOUNG UNIVERSITY
342 JRCB
PROVO, UTAH 84602-8000
(801) 422-5576 / FAX: (801) 422-0389

June 28, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

We are faculty and administrators at the J. Reuben Clark Law School who wish to endorse Thomas B. Griffith's nomination to the D.C. Circuit Court of Appeals. It has been our good fortune to associate frequently with Tom since he became general counsel at Brigham Young University on August 1, 2000.

Tom brought a rare blend of professionalism and personable style to his role. Early in his service, he met with a number of us at the Law School to discuss better ways to serve us as a college and ideas for bringing prominent legal figures to speak to our students. In every interaction, we found him inclusive and respectful of all perspectives; indeed, he has specifically sought our counsel on a number of important issues.

In specific instances of which we have personal knowledge, he has fought for promotion and recognition of women, including ethic minorities. His support has been vigorous even when faced with substantial administrative roadblocks.

Tom has been equally supportive of women students. For example, as soon as he learned that Justice Sandra Day O'Connor had accepted the invitation to be the University's Forum speaker, he contacted us to brainstorm about ways to allow large and small groups of female law students to meet with Justice O'Connor. Using his position as a member of the President's Leadership Council, he was able to facilitate several meetings between Justice O'Connor and women law students.

In our experience, some men in similar roles are not comfortable working with women as colleagues. Tom, on the other hand, seeks out and respects women's opinions. Indeed, if every person in university administration were as evenhanded on gender issues as Tom, Title IX and other ameliorative measures would be moot.

Thank you for the opportunity to allow us to share our high regard for Tom.

Very truly yours,

Constance K. Lundberg
Associate Dean
Professor of Law

Katherine D. Pullins
Associate Dean

Mary H. Hoagland
Assistant Dean

Cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510, and

Office of Legal Policy
United States Department of Justice

Wiley Rein & Fielding LLP

1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000
FAX 202.719.7049

Virginia Office
7925 JONES BRANCH DRIVE
SUITE 6200
McLEAN, VA 22102
PHONE 703.905.2800
FAX 703.905.2820

www.wrf.com

June 22, 2004

Laura A. Foggan
202.719.3382
lfoggan@wrf.com

VIA FACSIMILE

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Support for the Confirmation of Thomas B. Griffith

Dear Mr. Chairman:

I write in support of the confirmation of Thomas B. Griffith for an appointment to the United States Court of Appeals for the District of Columbia Circuit. Before accepting his current position as Assistant to the President and General Counsel of Brigham Young University, Tom Griffith was a partner at Wiley, Rein & Fielding LLP.

At Wiley, Rein & Fielding LLP, I worked with Tom Griffith both before he became counsel to the U.S. Senate and when he returned from that post to our firm until he went to Brigham Young University. Not only were Tom and I colleagues at the firm, we worked closely together on a variety of legal matters for clients of the firm. From these experiences, I know that Tom Griffith possesses the competence, as well as the temperament and demeanor that are sought after in a judicial nominee. He is a role model for all of us in his consistently positive outlook and collegial attitude. Accordingly, I am pleased to support his nomination to the U.S. Court of Appeals for the D.C. Circuit.

Very truly yours,

Laura A. Foggan

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary

Office of Legal Policy
United States Department of Justice

Record

June 28, 2004

Via Facsimile (202) 228-1698

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

This letter responds to recent newspaper articles and editorials that have addressed Thomas B. Griffith's service as Assistant to the President and General Counsel at Brigham Young University without being a member of the Utah State Bar. We feel that our service as former Utah Bar Presidents, and as Utah attorneys who frequently work with in-house general counsel, makes us uniquely qualified to comment on the issue.

While there is no formal "general counsel" exception to the requirement that Utah lawyers must be members of the Utah bar, it has been our experience that a general counsel working in the state of Utah need not be a member of the Utah bar provided that when giving legal advice to his or her employer that he or she does so in conjunction with an associated attorney who is an active member of the Utah bar and that said general counsel makes no Utah court appearances and signs no Utah pleadings, motions, or briefs.

We cannot opine on whether Mr. Griffith lived up to this standard, but wanted to provide the Committee with our perspective on this matter.

We would be pleased to answer any questions you or any member of the United States Senate Committee on the Judiciary might have.

Very truly yours,

John A. Adams
John A. Adams

Charles R. Brown
Charles R. Brown

Scott Daniels
Scott Daniels

Randy L. Dryer
Randy L. Dryer

Dennis V. Haslam
Dennis V. Haslam

600625.1

HOFSTRA UNIVERSITY

SCHOOL OF LAW
FACULTY

June 29, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington DC 20510

Re: Nomination of Thomas B. Griffith
to the United States Court of Appeals
for the District of Columbia Circuit

Dear Mr. Chairman:

This letter has been prompted by news reports that Thomas B. Griffith is being criticized for having practiced law in the District of Columbia and in Utah without a license. When I read those reports, I telephoned Mr. Griffith to get the facts. Based on those facts, it is my opinion that the criticisms of Mr. Griffith are without merit and are irrelevant to his confirmation as a federal judge.

Briefly, my qualifications to express an opinion on this issue are the following. I have specialized in lawyers' and judges' ethics for almost four decades. During that time, I have been invited to testify before the Senate Committee on the Judiciary several times, and have frequently testified as an expert witness on lawyers' and judges' ethics in federal and state courts. In addition to teaching professional responsibility at Hofstra University Law School, I have lectured on the subject twice a year for the past quarter of a century at Harvard Law School. In 1998, I received the American Bar Association's Michael Franck Award, the highest professionalism award conferred by the ABA, which was given for "outstanding contributions to the field of professional responsibility" and "a

lifetime of original and influential scholarship in the field of lawyers' ethics."

I first met Mr. Griffith in January of this year, at a dinner party with seven other people present. He and I talked for about an hour at dinner, and since then we have exchanged reprints of articles. That is the extent of our acquaintance. Although Mr. Griffith has impressed me as highly intelligent and conscientious, I am limiting this opinion to the ethical issue that has been raised.

In my opinion, the issue relating to Mr. Griffith's practice without a license has no relevance to whether the Senate should confirm his nomination to the D.C. Circuit. First, Mr. Griffith's failure to maintain his bar dues in the District of Columbia showed no disrespect for the rule, but was the result of oversight and the apparent lack of notification by the D.C. Bar. Second, while practicing as general counsel for Brigham Young University, Mr. Griffith made no court appearances and acted at all times in conjunction with one or more members of the Utah bar.

Third, and most important, the requirement of membership in a particular bar is not in itself a rule of *ethical* professional conduct. At worst, the requirement is one that has been characterized as a lawyers' "guild rule" (like minimum fee schedules and restrictions on advertising), designed to restrict competition. At best, on the other hand, the requirement of a license is intended to assure that one who holds himself out to the public as a lawyer is indeed competent to serve as a lawyer. In that regard, there is no question about Mr. Griffith's competence, which is the only *ethical* issue that is material here.

In the District of Columbia, Mr. Griffith had in fact been a member of the bar in good standing; the only problem was a temporary lapse in the payment of dues, which he promptly remedied when he became aware of it. He thereby once again became, and

remains, a member of the D.C. bar in good standing. Neither the bar nor anyone else has ever questioned Mr. Griffith's competence to practice law.

In Utah, Mr. Griffith's bar status was known to Brigham Young University, the only client for whom he did work as a lawyer. His legal work there was always in association with one or more members of the Utah bar, and he never appeared in court. Neither the bar nor anyone else has ever questioned Mr. Griffith's competence to practice law.

The issue for the Senate, of course, is Mr. Griffith's fitness to serve as a federal appellate judge. Matters of judicial ethics are critical to that determination, and the most important concern of judicial ethics is whether a judge can be impartial. *See* M.H. Freedman & A. Smith, UNDERSTANDING LAWYERS' ETHICS, Chapter 10 ("The Impartial Judge") (3rd ed., 2004). I am aware of nothing concerning Mr. Griffith -- and certainly not the bar license issue -- that raises any question whatsoever about his ability to render impartial justice to litigants who would appear before him.

I therefore respectfully urge that the Committee and the Senate disregard the irrelevant issue of bar membership, and focus instead on the true merits of Mr. Griffith's qualifications to serve as a federal appellate judge.

Respectfully submitted,

Monroe H. Freedman
Professor of Law

cc: The Honorable Patrick J. Leahy
cc: Office of Legal Policy

June 24, 2004

VIA FACSIMILE: 202-228-1698

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Thomas B. Griffith

Dear Mr. Chairman:

I am writing a letter in support of the nomination of Thomas B. Griffith to the DC Court of Appeals. I am currently Chairman of the International Section of Kirton & McConkie, a Salt Lake City law firm. I was previously head of the International Law Department of the Bristol-Myers Squibb Company in New York City.

For the last two years, I have been a close personal associate of Tom Griffith. We have discussed in detail his work at BYU and his nomination to the Bench. I have come to know that Tom is a man of great integrity, incredible intellect and considerable skill.

On behalf of this firm, I strongly recommend confirmation of Tom's nomination. The country will be extremely fortunate to have a Judge of his caliber.

Sincerely,

KIRTON & McCONKIE

Conan P. Grames
Chairman, International Section

CPG/wtc
cc (via fax): The Honorable Patrick J. Leahy
Office of Legal Policy, United States Department of Justice
Thomas B. Griffith

DAVIS POLK & WARDWELL

1300 I STREET, N.W.
WASHINGTON, D.C. 20005

1600 EL CAMINO REAL
MENLO PARK, CA 94025

99 GRESHAM STREET
LONDON EC2V 7NG

15, AVENUE MATIGNON
75008 PARIS

450 LEXINGTON AVENUE
NEW YORK, N.Y. 10017
212 450 4000
FAX 212 450 3800

WRITER'S DIRECT
212-450-4239

MESSETURM
60308 FRANKFURT AM MAIN

MARQUÉS DE LA ENSENADA, 2
28004 MADRID ESPAÑA

1-6-1 ROPPONGI
MINATO-KU, TOKYO 106-6033

3A CHATER ROAD
HONG KONG

June 21, 2004

Re: **Thomas B. Griffith**

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

I strongly support the President's nomination of Mr. Thomas B. Griffith to serve as a judge on the United States Court of Appeals for the District of Columbia Circuit. I urge the Judiciary Committee to approve his nomination promptly and to forward his name to the full Senate for a prompt confirmation.

I have known Mr. Griffith for more than twenty years. We met in law school when he was a class behind me at the University of Virginia. He was an outstanding student and served on the law review. As a member of the Managing Board, I had the chance not only to review Mr. Griffith's work, but to hear others talk about him. He was widely regarded by his peers and by members of my class as the most well-rounded and thoughtful, and possibly the brightest, member in his class. We enthusiastically selected him to serve on the Articles Review Board following our graduation.

During our respective careers, I have had many opportunities to see Mr. Griffith in action both professionally and personally. We both practiced in Washington, D.C. for several years. We often discussed the most important legal and judicial issues of our time. He was keenly interested in the health of our nation's government, and in particular our judicial system. Tom's commitment to public service led him to serve as Chief Counsel to the Senate during the late 1990's and to accept his present position as General Counsel of Brigham Young University, even though he could have made a lot more money continuing in private practice, where he had established himself as an outstanding litigator and partner at Wiley Rein & Fielding.

As a judge, Tom will be a careful and thoughtful interpreter of law, without an ounce of judicial activism from either side of the political divide. He is an unusually gifted writer, who will be able to write opinions that are to the point, understandable and useful for the parties to the case and for others that need to rely on them for precedent. He is deeply committed to the rule of law and in particular our Constitution and our system of government, can be expected to interpret laws and not to substitute his views for those of Congress, and will have a strong respect for precedent and honest reasoning. He is also a man of impeccable integrity and high ethics; if I had to entrust my life, liberty, property and ability to pursue happiness to any single person, I would gladly entrust them to Tom Griffith because I have complete confidence in his wisdom, intelligence, goodness and honesty.

I am a partner and head of the Financial Institutions Group at Davis Polk & Wardwell. During my career, I have had the privilege of working closely with some of our nation's best judges. I was a law clerk to Chief Justice Rehnquist, the year before he was confirmed Chief, and clerked for the Honorable J. Clifford Wallace the year before. I worked with Mike Luttig, now a judge on the U.S. Court of Appeals for the Fourth Circuit, when he was an associate in the Washington, D.C. office of Davis Polk. I was a roommate in college with Jay Bybee, who is now a judge on the U.S. Court of Appeals for the Ninth Circuit. As a result, I have had the privilege of closely observing many judges in action both before and after becoming judges. I have understandably developed views about the sort of qualities that make a judge great, and Tom Griffith has all of those qualities.

The District of Columbia Circuit needs another excellent judge. I cannot think of a more highly qualified, better candidate, for that position than Tom Griffith.

I therefore urge the Senate Judiciary Committee to approve his nomination promptly, and forward it to the full Senate for a prompt confirmation.

Very truly yours,

Randall D. Guynn

cc: The Honorable Patrick J. Leahy
Office of Legal Policy, Department of Justice

J. REUBEN CLARK LAW SCHOOL
BRIGHAM YOUNG UNIVERSITY
341 JRCB
PROVO, UTAH 84602-8000
(801) 422-4274 / FAX: (801) 422-0389

June 29, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

via FAX: 202-228-1698

re: Thomas B. Griffith, nominee to the United States Circuit Court of Appeals for the District of Columbia Circuit

Dear Mr. Chairman:

I understand questions are being raised concerning whether Thomas Griffith may have been in violation of Utah State Bar regulations because he has not been admitted to practice law in Utah while serving as Assistant to the President and General Counsel to Brigham Young University. I would like to share my perspective regarding Mr. Griffith and the Utah Bar. I have been a member of the law faculty at BYU since June 1974 and served as dean of the Law School for the past fifteen years, stepping down as dean on June 1, 2004. I served as chair of the search committee which recommended Mr. Griffith to the President of the University for appointment to his present position. I have been a member of the Utah State Bar continuously since 1972. Throughout the fifteen years of my service as dean of the Law School, I served as an *ex officio* member of the Utah Bar Commission and for many of those years served as a member of the Bar's Committee on Admissions to the Bar.

1. The fact that Mr. Griffith was not a member of the Utah Bar was, of course, well known to all relevant decision makers when he was recommended for and hired as Assistant to the President and General Counsel to BYU.

2. Brigham Young University is the largest private University in the United States and maintains its central campus in Provo, Utah. In addition to its Provo campus, the University also has a major campus in Hawaii and smaller campus locations in Washington, DC; London, England; Jerusalem, Israel; and Nauvoo, Illinois. In addition, the University maintains a wide variety of programs in many locations throughout the world. Many of its students are earning credit toward graduation while living temporarily in several states and many foreign countries. The University offers courses of study to students located throughout the world who receive instruction and study materials on-line via the internet. The University maintains an alumni organization which has local chapters in scores of cities in the United States and abroad. Its athletic teams and performance groups regularly perform in many states and in foreign countries. The University's world-wide presence is strikingly similar to a major corporation which conducts business in many states of the United States and throughout the world. A lawyer who is employed as General Counsel to such an entity and who provides legal and other services only to his or her employer is obviously not licensed to practice law in every jurisdiction where the entity has suppliers, customers, or shareholders or where its advertisements may reach. I view BYU's Assistant to the President and General Counsel in exactly the same situation in regard to his bar membership.

3. During the many years I served on the Bar Admissions Committee there were discussions in the Committee about a wide range of related bar admissions issues including, as examples, multi-jurisdictional law practice, admission on motion, reciprocity rules governing bar admission, attorney examinations, and the status of corporate in-house lawyers working in Utah. Some of these issues were brought to recommendation for action by the Bar Commission. The question of license requirements for in-house corporate lawyers was never felt to have a high enough priority to warrant more that brief discussion although it was generally acknowledged that many in-house lawyers located in Utah were not members of the Utah Bar. No recommendation was ever made by the Committee that these lawyers should be prosecuted for unauthorized practice of law. Given the number of important bar membership issues confronting the Committee, it is not at all surprising to me that the corporate counsel "issue" was not viewed as a matter warranting enforcement action. The American Bar Association and many state bar associations, including Utah, are currently developing formal recommendations regarding the above mentioned issues. These recommendations recognize, among other things, the reality that many entities' legal needs reach across state boundaries and national borders. They also acknowledge the existing customary practices of many state bar associations, including Utah, with respect to the licensing requirements of in-house counsel.

4. It is my belief and understanding that Thomas Griffith has been meticulous in adhering to the advice given by Utah Bar Counsel that he be closely associated with Utah lawyers when delivering legal advice. Furthermore, I believe that Mr. Griffith has conducted his professional service to his sole client, Brigham Young University, in a completely appropriate manner in all regards and consistent with common practices of general counsel to large U.S. entities who conduct multi-state and international activities.

Thank you for considering these views. If I can be of additional help, please let me know.

Very truly yours,

H. Reese Hansen

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510
via FAX: 202-224-9516

Office of Legal Policy
United States Department of Justice
via FAX: 202-514-5715

THE OHIO STATE UNIVERSITY
Moritz
College of Law

Steven F. Huefner
Assistant Professor of Law &
Legislation Clinic Director
Direct Line: 614-292-1763
huefner.4@osu.edu

June 21, 2004

BY FACSIMILE AND FIRST CLASS MAIL

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Thomas B. Griffith

Dear Mr. Chairman:

I am writing in wholehearted support of the nomination of Thomas B. Griffith to be a judge on the United States Court of Appeals for the District of Columbia Circuit. I have known Tom since the fall of 1995, when I began working for him as an Assistant Senate Legal Counsel in the Office of Senate Legal Counsel. For the next four years, until Tom completed his service as Senate Legal Counsel in 1999, I worked closely with him on a daily basis. After I departed the Senate in 2000 to begin teaching law at the Ohio State University, I have continued to keep in regular touch with Tom and to follow his work at Brigham Young University. Throughout my association with him, I have found Tom to be a careful, reflective thinker with both a thorough grounding in legal principles and the ability to appreciate the practical impact of those principles. I have every confidence that he will be an outstanding judge and a dedicated public servant.

As you know, the Office of Senate Legal Counsel is a small office, notwithstanding the wide range of matters that it handles. During all of my time working there with Tom, the office consisted of no more than four attorneys. Thus, it was essential to our success that we work well together, both in our professional duties and in our interpersonal relationships. Tom was an effective leader who took the time to understand issues completely. In devoting himself to producing the highest quality product, Tom was both assiduous in his own work and attentive to the views and expertise of his staff. Furthermore, the office was frequently called upon to provide neutral legal advice in connection with politically charged matters. In this potentially challenging context, working with Tom was always a delight. Tom worked especially closely, and amicably, with the Deputy Senate Legal Counsel to get the law right, notwithstanding often contrasting political views.

Tom also was wonderful at setting a collegial tone in the office. Of course, Tom's professionalism in conducting the Senate's legal work contributed to this collegiality. But complementing his legal judgment and professional skill were Tom's characteristic thoughtfulness

and warmth. His response to the occasional personal crises of members of the office staff provided additional evidence that Tom is a caring and humble person who leads by example.

Tom is exceptionally well-suited to serve on the bench. In all my interactions with Tom, I have found him to be both wise and temperate. In addition, he is a person of great integrity who strives to treat everyone justly. Having once myself served as a judicial clerk on the D.C. Circuit, I can easily picture Tom as a judge there. Not only will he relate well with his colleagues and help to build the court as an institution, but more importantly he will serve with wisdom and fairness in resolving matters before the court. I hope the Committee on the Judiciary will quickly recommend his confirmation to the full Senate.

Please feel free to contact me if I can provide further information.

Sincerely,

Steven F. Huefner

cc: The Honorable Patrick J. Leahy, Ranking Member, Committee on the Judiciary
Office of Legal Policy, United States Department of Justice

Glenn F. Ivey

June 18, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Hatch:

I write this letter in support of Thomas B. Griffith's nomination to the United States Court of Appeals for the District of Columbia Circuit. I believe Mr. Griffith is an exceptional nominee and would make an excellent judge.

During Mr. Griffith's tenure as Senate Legal Counsel, I served as Democratic Counsel to the Senate Banking Committee and, subsequently, as Counsel to Senate Democratic Leader Tom Daschle. Although Mr. Griffith and I have different party affiliations and do not agree on all political matters, I learned during the Senate's Whitewater and Campaign Finance Reform investigations that Mr. Griffith took seriously his oath of office. Even when we were handling sensitive and politically charged issues, he acted in a non-partisan and objective manner. He offered excellent legal advice and demonstrated sound legal judgment on a variety of complex matters. I believe that Mr. Griffith has the intellect and the temperament to make an outstanding jurist.

Sincerely,

Glenn F. Ivey

cc: The Honorable Patrick J. Leahy
The Honorable Paul Sarbanes
The Honorable Tom Daschle
Office of Legal Policy

14735 Main Street, Suite 349M, Upper Marlboro, MD 20772
301-952-4295 gfivey@co.pg.md.us

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF THE GENERAL COUNSEL

THE GENERAL COUNSEL

July 2, 2004

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510-6275

Dear Mr. Chairman:

As the General Counsel of the United States Department of Education and a former counsel to the Judiciary Committee, I write enthusiastically to support the nomination of Thomas Griffith of Utah to be a judge on the United States Circuit Court for the District of Columbia Circuit.

Tom and I served together as members of the Secretary of Education's Commission on Opportunity in Athletics, which was charged by the Secretary to examine the Department of Education's enforcement of Title IX of the Education Amendments of 1972, specifically as it relates to intercollegiate athletics.

It is my interaction with Tom during our service on the Commission that causes me to support his nomination. During the Commission's months of deliberation it was quite clear that every member of the Commission – including Tom – *strongly* supports Title IX and is immensely proud of the progress brought about by its passage. Nevertheless there were strong, and sometimes differing, convictions about the effectiveness of the Department of Education's enforcement efforts over the years. Tom was consistently a member of the Commission who was not only willing but also eager to engage every commissioner's opinions – listening and deliberating in a thoughtful manner, in a sincere effort to bridge disagreements and seek consensus where possible. Tom could often be found during the Commission's breaks and recesses thoughtfully discussing testimony with members of the Commission with whom he had public disagreements. Indeed, I was personally involved in a number of conversations with Tom in which he forcefully but cordially criticized the Department, the entity that I represented on the Commission.

In the end, it is important to emphasize that the Commission produced a report containing 23 recommendations for strengthening the Department's Title IX enforcement efforts, 15 of which were unanimously agreed upon. Tom was a critically important factor in ensuring that the Commission could reach such broad consensus on a generally contentious public policy issue. His erudition, thoughtfulness, courtesy and willingness to constructively engage commissioners with whom he might have some disagreement helped propel the Commission's work toward the constructive consensus it ultimately achieved. These attributes would, of course, serve Tom well as a judge of the United States Circuit Court of Appeals.

Thank you for your attention to this important nomination and I urge the Committee's prompt approval of this most extraordinary public servant.

Very truly yours,

Brian W. Jones

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510

Office of Legal Policy
United States Department of Justice

JUSTICE FOR ALL PROJECT

June 27, 2004

Via Fax (202) 228-2258 & (415) 393-0710

The Honorable Dianne Feinstein
The United States Senate
Washington, DC 20510

Dear Senator Feinstein:

On behalf of the Justice for All Project, our partnering organizations and the hundreds of thousands of Californians we represent, we write to express our strong opposition to the nomination of Thomas B. Griffith to the U.S. Court of Appeals for the District of Columbia Circuit. Through his role as a member of the President's Commission on Opportunity in Athletics from June of 2002 to July of 2003, Thomas B. Griffith proved himself hostile to Title IX, the landmark federal law that prohibits sex discrimination in education, "numeric measures" of discrimination, and the clearly established precedent of eight district courts. Indeed, his actions on the commission were, by his own admission, so "radical" that they "went down in flames."

The views and actions expressed while Griffith served on the commission, speak to a larger danger to all Americans' fundamental civil rights were he to be confirmed. We have in numerous other recent appointments that nominees who profess to the ability to leave behind strongly held positions on particular areas of the law in their confirmation hearings and promise to be open and impartial if confirmed to the bench, are unable to put their earlier approaches aside in their decisions. It is alarming to think that, should Mr. Griffith be confirmed, Title IX cases coming before the DC Circuit might be determined by a Judge Griffith who has already exhibited a strong desire to significantly weaken this incredibly important statute, particularly because Griffith's explanations for his extremism raise significant questions regarding his ability to fairly adjudicate other cases critical to the health of our democracy. His opposition to what he calls "numeric measures" even in segregated settings where they act only as a means of measuring discrimination in the allocation of opportunities, suggest that he is likely to be hostile to numerical measures in other settings as well. Widespread adoption of Griffith's view would threaten our ability to engage affirmative action remedies for discrimination in employment and contracting as well as our ability to employ statistical evidence in proving facially neutral employment practices are adversely affecting certain segments of the population.

Moreover, Thomas B. Griffith's willingness to explain away the rulings of eight separate circuit courts upholding Title IX, as "they got it wrong" calls into question his regard for

precedent and his willingness to uphold those civil rights laws with which he personally disagrees.

We are also concerned that Mr. Griffiths allowed his license to practice law to lapse for three years. While we can, for the sake of argument, grant that a "clerical error" could result in not fulfilling the requirements to keep one's license active for perhaps a year, it is difficult to see how a lapse of 3 years indicates anything other than a cavalier attitude toward the everyday responsibilities and obligations that most people understand they must attend to.

The Justice for All Project supports a fair and balanced judicial nominating process. We support the appointment of open-minded federal judges who view the Constitution as a living document and share a commitment to the role of the federal courts in protecting civil rights, individual liberties and the environment, as well as guaranteeing due process, equal protection of the laws, and the right of privacy and access to justice. We understand the unique role that the District of Columbia Circuit plays due to the expanded and special jurisdiction granted to it by Congress and believe that the confirmation of Thomas B. Griffith would negatively and significantly impact the precarious balance which now exists on that bench--tilting it far rightward in a way that neither reflects the beliefs nor serves the interest of mainstream Americans.

Accordingly, we oppose his confirmation to the District of Columbia Circuit Court of Appeal and urge you to question him closely and vote against him when he comes before you in committee.

Sincerely,

Susan Lerner for

Justice For All Project

Members of the Justice for All Project include:

Susan Lerner, Chair
Committee for Judicial Independence
Los Angeles, CA

Candance M. Carroll, Esq.
President
California Women Lawyers
San Diego, CA

Marjorie R. Sims
Executive Director
California Women's Law Center
Los Angeles, CA

Mark Hull-Richter
California Groups Moderator
Democrats.com
Orange County, CA

Sharon Gadberry, PH.D. President
NAWBO-San Francisco Chapter
San Francisco, CA

Harriet Rothenberg
California State Public Affairs Chair
National Council of Jewish Women
Long Beach, CA

Ellie Craig Goldstein, President
National Council of Jewish Women/Los Angeles
Los Angeles, CA

Helen Grieco, Executive Director
California National Organization for Women
Sacramento, CA

Linda Cianciolo
Chair, Reproductive Rights Committee
San Diego National Organization for Women
San Diego, CA

Marcos Barron, Director
People for the American Way, Western Region
Los Angeles, CA

Pam Cooke
Stonewall Democratic Club
Los Angeles, CA

Bill Lakin, Board Member
Unitarian Universalist Project Freedom of
Religion
Cambria, CA

Marcos Barron, Director
People for the American Way, Western Region
Los Angeles, CA

Eric Gordon, Director
The Workmen's Circle/Arbeter Ring SoCal District
Los Angeles, CA

Joyce Schorr, President
Womens Reproductive Rights Assistance Project
Los Angeles, CA

cc: Senator Orrin Hatch
Senator Patrick Leahy

Published Opposition to the Nomination of Thomas B. Griffith To the D.C. Circuit Court of Appeals

Editorials

Scofflaws Shouldn't Be Judges, Toledo Blade, June 30, 2004.

A Nominee With No License, The New York Times, June 27, 2004

Expired License, Salt Lake Tribune (Utah), June 27, 2004

Briefly Put..., Roanoke Times & World News (Roanoke, VA), June 23, 2004

Letters to the Editor

Public Will Give Verdict With Its Vote, Susan Lerner, Los Angeles Times, October 9, 2004

Editorials

Scofflaws Shouldn't Be Judges, Toledo Blade, June 30, 2004.

The White House always refers to each of its nominees for federal judgeships as "distinguished," but the latest, Thomas B. Griffith, really is different from the others. He's been practicing law for the past four years without a license.

Mr. Griffith, President Bush's choice to sit on the federal appeals court for the District of Columbia, has been serving as general counsel at Brigham Young University in Utah, even though he's not licensed as a lawyer in that state.

And it's not the first time the nominee has ignored legal licensing requirements. He let his license expire in the District of Columbia for three years in the 1990s, while he was lead counsel to Senate Republicans during the impeachment of President Bill Clinton.

GOP officials insist these lapses were just technicalities, nothing to disqualify Mr. Griffith, but the President of the United States should be able to find a better nominee for a lifetime appointment to a key federal appellate post. Failure to do so will give credence to the view that Mr. Bush is intent on packing the federal courts with political hacks rather than people who will impartially interpret the law.

Indeed, Mr. Griffith, 49, a Mormon, is the very model of a "Republican lawyer," which is how he is described on the Web site of the Republican National Lawyers Association.

Educated at BYU, he is a 1985 graduate of the University of Virginia law school and has been a doctrinaire member of the GOP legal apparatus in Washington.

Nothing in his resume would necessarily indicate the propensity to be a scofflaw, if that's what Mr. Griffith is. But if he was careless about the licensing paperwork, well, that's not a good quality for a judge who would handle major cases involving the federal government and regulatory agencies.

For all the partisan hoo-ha about Democratic obstructionist tactics, two-thirds of President Bush's judicial nominees have been confirmed by the Republican-controlled Senate. Mr. Bush should be able to find someone who hasn't ignored a basic legal requirement.

A Nominee With No License, The New York Times, June 27, 2004.

Opposition to President Bush's judicial nominees has often turned on their legal philosophies, but that is not true of Thomas Griffith. This nominee to the United States Court of Appeals for the District of Columbia Circuit faces a more straightforward problem -- he practiced law in two separate jurisdictions without the required license. The Senate should not confirm him, and it should regard his situation as a reminder of the need to be vigilant in vetting the administration's remaining nominees.

The Washington Post first reported that Mr. Griffith, the general counsel at Brigham Young University, had failed to renew his license for three years while practicing law in Washington, D.C. Mr. Griffith blamed his law firm's staff, but this obligation falls to the lawyer, not his firm.

Mr. Griffith's troubles grew considerably when The Post reported last week that he had been practicing in Utah for the past four years without a license. Utah lawyers must have Utah licenses, unless their work is unusually limited in scope. Mr. Griffith's position as a major university's top lawyer clearly does not fall into this narrow exception.

The unlicensed practice of law is no small matter, and certainly should disqualify anyone from sitting on what is often called the nation's second-most-important court. Licensing puts a considerable burden on lawyers, who must study for bar exams and pay dues, but it is critical to policing the legal profession. Mr. Griffith has shown a striking disregard for the rules, and his profession.

President Bush accuses the Senate of acting too slowly to confirm his judicial nominees, but the opposite is often true. The American people would have benefited from a more thorough vetting of some of those already serving on important courts. Exhibit A has to be Jay Bybee, now a judge on the San Francisco-based United States Court of Appeals for the Ninth Circuit. When Mr. Bybee was nominated, critics warned that he had dangerous views on civil liberties, but he was overwhelmingly confirmed. Now we know that as a top Justice Department official, he signed the infamous memo saying torture of

suspected terrorists "may be justified." Had the Senate uncovered the memo before his confirmation, as it should have, Mr. Bybee might not have his lifetime seat on the court.

With the election approaching, the White House may pressure the Senate to confirm nominees more quickly. This spring, Senate Democrats agreed to allow votes on 25 noncontroversial judicial nominees, and they have been doing so. But the Senate has an obligation to ensure that no nominees, whether part of that deal or not, are confirmed who do not meet the high standards appropriate for these important posts.

Expired License, Salt Lake Tribune (Utah), June 27, 2004.

Everybody's done it. Forgotten to renew a driver license or pay their property taxes on time. Life is hectic, and oversights happen.

Often busy professionals leave life's mundane chores to underlings. Then a clerical error occurs. Suddenly a high-powered lawyer discovers that the worker bees in his firm fouled up, and his law license has not been renewed. He gets a notice in the mail, swears under his breath (or maybe louder), chews out somebody in the office and quickly writes a check to the bar association to pay his back dues and renew his license.

Hey, it could happen to anybody.

But if you are Thomas B. Griffith, you are not just anybody. You are President Bush's nominee to the bench of the U.S. Court of Appeals for the District of Columbia Circuit, generally considered to be the second-most-important federal court in the land after the Supreme Court of the United States.

When it comes out that your law license in D.C. lapsed for not just one year, but for three, before you caught the mistake and made it right, people wonder. Is he a victim of circumstance, is he just careless, or does he not take the renewal of his law license seriously?

And since judges are responsible for disciplining lawyers in their jurisdiction who don't renew their licenses, should Griffith sit in judgment of others in that situation? Particularly when he may have practiced law in Utah for four years without a license, because the lapse of his D.C. license prevented him from getting a reciprocal license in the Beehive State when he moved here to become the general counsel of Brigham Young University.

Griffith consulted the Utah Bar Association about his problem, and its officials advised him that if he was giving legal advice to BYU, he would have to do it in conjunction with a licensed lawyer. BYU says he has done that.

The Utah Bar also advised him to sit for the local bar exam. He signed up to do that, but never did. That's understandable, because bar exams are onerous, especially for someone

who has been out of law school for decades. The local bar is prevented by its rules from saying whether it is conducting any proceeding involving Griffith for practicing in Utah without a license.

A clerical oversight should not disqualify someone from being a judge. But this looks like more than that. It looks like carelessness, or worse, arrogance.

A license is the essence of being a professional. Plumbers and teachers know that, and so should lawyers.

Playing by the rules is what the law is about. Any lawyer who does not exemplify that concept in his own behavior should not be on the bench, especially one as important as the appellate court in D.C.

Briefly Put..., Roanoke Times & World News (Roanoke, VA), June 23, 2004.

President Bush intends to nominate to a federal judgeship the Utah lawyer who provides legal counsel to Brigham Young University but who lacks a valid law license because he never took the Utah bar exam.

Thomas B. Griffith, who had to regain his Washington, D.C., law license after it was revoked for not paying his bar association dues for several years, was nominated last month for the U.S. Court of Appeals for the District of Columbia Circuit.

Technical legal detail could prove judicially problematic for someone so inclined to overlook procedural details.

Letters to the Editor

Public Will Give Verdict With Its Vote, Susan Lerner, Los Angeles Times, October 9, 2004.

Today, the only reason we are not subject to the Patriot Act's "indefensible provisions" ("Congress, Read It This Time," editorial, Oct. 4) is that District Judge Victor Marrero acted the way he is supposed to: independently. Had the case gone before any of the more than 200 partisan judges appointed and confirmed during the last four years, our liberties could well be in far greater jeopardy. Would a judge who signed a memo sanctioning the government's use of torture in contravention of U.S. and international law rule that the Patriot Act contains indefensible provisions? Such a judge, Jay Bybee, sits on our 9th Circuit bench today, appointed by George W. Bush and confirmed by the Senate. There are other ideologically objectionable Bush nominees whose appointments remain pending, such as William Haynes, also implicated in the torture memo scandal, and Thomas Griffith, who has practiced law for the last seven years without a license. Yet

Orrin Hatch, Senate Judiciary chairman, is attempting to force yet more of these ideological jurists through the Senate despite a long-standing tradition of not confirming judicial nominees during a presidential election. On Monday, yet another objectionable Bush circuit court nominee, Susan Neilson, was passed by the Senate Judiciary Committee. We should be able to protect our Constitution and halt the most egregious court-packing in the nation's history at the ballot box this fall. In the meantime, Senate Democrats must do more to help protect our courts from right-wing takeover.

Susan Lerner, Los Angeles

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman,

As you consider Mr. Tom Griffith's appointment, I wish to share my opinions developed by serving on the Secretary's Commission on Opportunity in Athletics. It is my belief that the cause of equal opportunity in sport has no better friend.

Throughout the work of our commission, Mr. Griffith demonstrated his strong support for the goals of Title IX and his sense that it comprises a great landmark of civil rights. Everything in the work I observed on that commission convinced me of his genuine concern, and that his frustrations dealt with how the law was too often being applied.

Mr. Griffith's position as a legal advocate for his university provided him with a close view of the realities of Title IX implementation, a benefit he shared with the entire commission. What we all learned in the process was that many of the actions being taken in defense of Title IX were actually serving to undercut its support in the broader community.

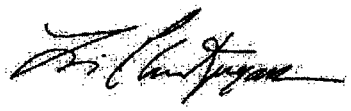
I was constantly amazed by the suggestions made by those whose ends were not met in our conclusions, that anybody on that commission lacked a full hearted support for the intentions of Title IX. It simply was not the case. As a woman and nationally competitive athlete during younger days, I was particularly amused to hear that I was not a supporter of women's participation in sports.

I can remember reading one group's conclusion about Mr. Griffith, wherein they dismissed his opinions as uninformed. An egregiously silly statement. In addition to providing a major university with legal advice on the matter, those of us working with Tom on the commission knew him to have five daughters active in sports, several of whom he had coached in softball himself.

It is not news to you that people will distort another's intentions in order to advance their own, and I am sure it is happening to Tom again now. What I can report to you is that beyond his support for Title IX, which I happened to share, I found Mr. Griffith to be extremely thoughtful, respectful of others' opinions, and possessive of a clear talent for distilling issues to their essence so they could be acted upon. While I am certain that he and I would not share an identical philosophy on all matters, I can certainly think of few people I would trust more than Mr. Griffith with making a well reasoned and balanced judgment.

I appreciate your taking the time to read my thoughts regarding Mr. Griffith's nomination and would gladly respond further to any questions you may have in this regard.

Sincerely,



Lisa Graham Keegan

Cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510, and

Office of Legal Policy
United States Department of Just

June 11, 2004

BY E-MAIL (letters@washpost.com)

Editor
Letter to the Editor
The Washington Post
1150 15th Street, N.W.
Washington, DC 20071

Dear Editor:

We write in response to the June 4th article on the nomination of Thomas B. Griffith to the D.C. Circuit. We have worked with Tom in a variety of contexts. Contrary to the *Post's* implication, Tom is an outstanding attorney who takes his responsibilities as a member of the bar seriously. Tom did not receive his D.C. Bar bill as an attorney for the federal government in 1998. Thereafter, the D.C. Bar sent no statements either to Tom or to his law firm. As soon as he realized that bills were unpaid, he paid them. Tom took the common and proper course of action under the circumstances. This innocent oversight has no bearing on his ability to serve as a judge.

For years Tom has been a leader in the bar and has shown dedication to its principles. The federal bench needs judges like Tom, an excellent lawyer who is supported across the political spectrum, including by Dean Michael Young, Steve Umin, Jim Slattery, Kirk Jowers, Trevor Potter and Gene Schaerr, and law professors Stephen Saltzburg and Tom Morgan. With them, we support Tom and believe he has the intellect and judgment to be an excellent judge.

David E. Kendall
Williams & Connolly LLP
725 Twelfth Street, N.W.
Washington, DC 20005
202-434-5145
dkendall@wc.com

Lanny A. Breuer
Covington & Burling
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401
202-662-5538
lbreuer@cov.com

from the office of

Senator Edward M. Kennedy

of Massachusetts

FACT SHEET ATTACHED
FOR IMMEDIATE RELEASE
March 8, 2005

CONTACT: Laura Capps / Melissa Wagoner
(202) 224-2633

STATEMENT OF SENATOR EDWARD M. KENNEDY ON THE NOMINATION OF THOMAS GRIFFITH TO THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT

Today we consider the nomination of Thomas Griffith to a lifetime position on the U.S. Court of Appeals for the D.C. Circuit. The D.C. Circuit is widely regarded as the nation's most important appellate court, and it's often been a stepping-stone to the Supreme Court. It has a unique role among the federal courts in interpreting federal power, and has exclusive jurisdiction over many laws that protect consumers, workers' rights, civil rights, and the environment.

Because the Supreme Court hears only a few cases each year, for many citizens seeking justice, the D.C. Circuit is the court of last resort.

Mr. Griffith's record raises concerns about his position on civil rights. He has proposed what he admits is a Aradical change in the interpretation of Title IX, the landmark law against gender discrimination in education. As a member of the Department of Education's Title IX Commission, he suggested eliminating the well-established Athree-part test for measuring compliance with Title IX.

That test has been in place since 1979, and has revolutionized opportunities for women in sports. Every federal court of appeals that has considered the issue has approved the test, and every Administration B Democratic and Republican alike B has agreed that the test is valid, and not a quota.

Yet Mr. Griffith pushed the Commission to eliminate the test as illegal. He argued that all numerical tests are "illegal, unfair, and wrong," a view that is plainly inconsistent with established interpretations of Title IX and many other civil rights laws. It's vital that anyone confirmed to a life-time position as a federal judge demonstrate a firm commitment to the rights of all Americans and to the nation's progress on civil

rights, women's rights, and individual liberties.

Mr. Griffith's nomination also raises other troubling issues. I can't recall any other judicial nominees who failed to comply with requirements of the bar association where they practiced law, or whose records raised serious questions about whether they had been involved in the unauthorized practice of law. These are grave matters, and the Committee has a duty to consider them carefully.

Mr. Griffith allowed his D.C. bar membership to lapse for three consecutive years while he practiced law in the District of Columbia, resulting in his suspension for non-payment of dues. We also know that, in May 2003, the Utah Bar advised him to take the state bar exam, because he was practicing law as General Counsel for Brigham Young University. Yet Mr. Griffith never joined the Utah bar, although he continues to practice law in that state.

Mr. Griffith also gave a false answer, under
oath, to the question on a Utah Bar application of whether he had ever been suspended as an attorney. He denied ever having been suspended B despite two suspensions from the D.C. Bar, the second lasting three years.

The American people have a right to know how Mr. Griffith would rule in cases involving Title IX and other civil rights laws. They have a right to a full explanation of Mr. Griffith=s failure to obey the basic rules for practicing law.
These issues were not resolved in Mr. Griffith's previous hearing, and I hope today's hearing will provide better answers to these important questions. I look forward to this hearing and to Mr. Griffith's explanations.

###

THOMAS GRIFFITH
NOMINEE TO THE U.S. COURT OF APPEALS FOR THE D.C. CIRCUIT

Thomas Griffith is a graduate of Brigham Young University (1979) and the University of Virginia Law School (1985). He was engaged in private practice as an associate in the N.C. firm of Robinson, Bradshaw & Hinson (1985-1989), and later as an associate and then a partner at Wiley, Rein & Fielding (1989-1995), before becoming Senate Legal Counsel (1995-1999). He returned to Wiley, Rein & Fielding in 1999, where he remained until becoming Assistant to President and General Counsel of Brigham Young University in 2000.

Failure to take the Utah Bar Exam and to Pay Required Bar Dues: Thomas Griffith has repeatedly failed to maintain a law license in jurisdictions where he practiced, revealing, at best, carelessness about the basic rules that govern the conduct of all lawyers.

- Griffith admits that for three years beginning in 1998, he failed to pay D.C. Bar dues and was suspended from membership in the D.C. bar. During this time, he was practicing law in D.C. including signing pleadings filed in court.

- Griffith admits that although he has practiced law in Utah since becoming General Counsel of Brigham Young University in 2000, he never took the Utah bar. He has had several opportunities to take the bar exam since moving to Utah, and the Utah Bar advised him to take the exam in 2003.

- As Griffith acknowledges, Utah law forbids the practice of law in Utah without first joining the Utah Bar.

Hostility to Basic Interpretations of Title IX, a Landmark Law Against Sex Discrimination in Education:

- As a member of the Department of Education's Commission on Opportunity in Athletics ("Title IX Commission") created in 2002, Griffith supported the Title IX Commission's harmful recommendations, which were eventually rejected by the Bush Administration.

- While serving on the Title IX Commission, Griffith made what he admits was a "radical" proposal to eliminate the "substantial proportionality" test for Title IX compliance, which has been upheld by every federal court of appeals that has considered it. This test allows educational institutions to comply with Title IX by offering athletic opportunities (spots on teams) to male and female students that are in substantial proportion to each gender's representation in the student body.

- Griffith's proposal was rejected by the conservative Commission by a vote of 11 to 4. However, legal issues related to Title IX will continue to come before the courts, including the D.C. Circuit.

Wiley Rein & Fielding LLP

1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000
FAX 202.719.7049

Virginia Office
7925 JONES BRANCH DRIVE
SUITE 6200
McLEAN, VA 22102
PHONE 703.905.2800
FAX 703.905.2820

www.wrf.com

June 21, 2004

Paul F. Khoury
202.719.7346
pkhoury@wrf.com

VIA FACSIMILE

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Support for the Confirmation of Thomas B. Griffith

Dear Mr. Chairman:

As Chairman of the Pro Bono program at the Washington D.C. firm of Wiley Rein & Fielding LLP and a life-long democrat, I write to offer my wholehearted support for our former law partner Thomas B. Griffith in his confirmation proceedings for a seat on the United States Circuit Court of Appeals for the District of Columbia.

While at the firm, Tom served as co-counsel with me in our representation of Joseph Patrick Payne, Sr., an inmate formerly on death row in Virginia for a crime we became convinced he did not commit. Tom demonstrated a remarkable tenacity and commitment to the case. He played a key role in our presentation of evidence at the state habeas corpus hearing and then throughout the following appellate process. Even after he left the firm to become Senate Legal Counsel, Tom offered invaluable assistance to us as we initiated a campaign seeking clemency for our client from then Virginia Governor George Allen. Ultimately, in November 1996, Governor Allen commuted the sentence three hours before the scheduled execution, citing "a substantial question involving the reliability of evidence presented at or after the trial." I do not think we would have achieved this result without Tom's dedicated help.

Tom demonstrated exemplary legal skills in this and other cases he handled at the firm. What impressed me even more, however, was his passionate pursuit of a just result. I believe that this unfailing desire to ensure that justice is served is the most important quality for an appellate court judge to possess.

I understand that the confirmation process is often subject to partisan politics. As a democrat, I hope for the sake of our judicial system that such matters do not cloud the consideration of a man who would be an outstanding addition to the bench.

I consider it a privilege to have worked with Tom and am honored to support him. I would be delighted to provide any further information you may require.

Sincerely,

Paul F. Khoury

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington D.C. 20510

Office of Legal Policy
United States Department of Justice

ARRINGTON
OLEMAN
LOMAN &
LUMENTHAL L.L.P. 200 CRESCENT COURT • SUITE 1500 • DALLAS, TEXAS 75201-1848 • TEL 214.855.3000 • FAX 214.855.1333
TTORNEYS AT LAW

RODNEY H. LAWSON
DIR: 214.855.3054
FAX: 214.758.3754
E-MAIL: RLAWSON@CCSR.COM

June 22, 2004

Via Fax 202/228-1698
The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Mr. Thomas Griffith

Dear Mr. Chairman:

I am writing this letter on behalf of Tom Griffith, who has been nominated by President Bush for the United States Court of Appeals for the D.C. Circuit.

I want to preface my remarks by saying that I am a Democrat. I have supported John Kerry financially and intend to vote for him in November.

Tom Griffith has been my colleague and friend for approximately ten years. Even though I am confident that we disagree on many judicial issues, I strongly recommend and endorse his nomination. As I suspect you know, Tom is not only very bright and capable, but also very ethical and judicious. By any objective or subjective standard, he has the "right stuff" to sit on the federal bench.

By way of brief background, I first met Tom when he was an associate with the Wiley, Rein & Fielding firm in Washington. I have kept in touch with him and followed his career from his election into the partnership of that fine firm, his work as counsel for the United States Senate, and his current position as general counsel for Brigham Young University.

I cannot think of a more qualified candidate than Tom to break this partisan log jam regarding judicial appointments, which seems to have persisted for at least two administrations. While I am confident that, if appointed to the D.C. Circuit, I will disagree

with some of Tom's rulings, I have no doubt that with respect to every matter before him, he will thoughtfully consider the positions of all sides and render a well-reasoned, fair, and impartial decision.

Sincerely,

Rodney H. Lawson

/ta

cc: The Honorable Patrick J. Leahy (*via fax 202/224-9516*)
Office of Legal Policy (*via fax 202/514-5715*)

LAW OFFICES
WILLIAMS & CONNOLLY LLP
725 TWELFTH STREET, N.W.
WASHINGTON, D. C. 20005-5901
(202) 434-5000

EDWARD BENNETT WILLIAMS (1920-1988)
PAUL R. CONNOLLY (1922-1978)

STEVEN M. UMIN
(202) 434-5047
FAX (202) 434-5099
sumin@wc.com

June 14, 2004

United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Hatch and Senator Leahy:

We write in support of the nomination of Thomas B. Griffith to the United States Court of Appeals for the D.C. Circuit. We have worked with Tom in a variety of contexts and can attest to his outstanding character and legal ability.

Recently, Tom was unfairly portrayed in the *Washington Post* for late payment of his D.C. Bar dues. The *Post* improperly equated Tom's situation to "disciplinary suspension," a rare sanction imposed only when a lawyer knowingly refuses to pay bar dues. It was nothing of the kind. When advised of the problem, Tom promptly paid his dues in full. Tom is an outstanding attorney who takes his responsibilities as a member of the bar seriously. As the attached Letters to the Editor demonstrate, Tom is supported by many people on this issue.

In 1998, while he was serving as the United States Senate Legal Counsel, Tom did not receive his D.C. Bar invoice. Indeed, the D.C. Bar has confirmed that there is no record of a standard "certified receipt," that would have been returned in September 1998 had such a reminder letter been sent to Tom. After 1998, the D.C. Bar sent no statements either to Tom or to his law firm regarding any late bar dues. When Tom returned to Wiley Rein & Fielding in 1999 for sixteen months, he assumed that th firm was paying his bar fees, as it did for all other attorneys.

Each year, the D.C. bar sends its members a reminder to renew their bar memberships. In this process there is always potential for inadvertent oversight. As a result, D.C. Bar counsel notes that every year over 3,000 D.C. lawyers (and a number of sitting judges) are "administratively suspended" for late payment of dues. This is what happened to Tom. By immediately paying his dues when he became aware of the oversight, Tom took the proper course of action. According to the D.C. Bar counsel, such an oversight is entirely common and of no major concern, particularly where no

reminder notice is sent out. In fact, Tom was promptly reinstated after he paid his accrued dues, without any question raised about possible sanctions.

Those whose names appear below are all experienced lawyers and active in the organized bar. In our opinion, this matter does not raise a question concerning Tom's fitness to serve on the bench. Each of us has had extensive contact with Tom and believes him to be extremely well qualified for service on the D.C. Circuit. For years Tom has been a leader in the bar and has shown dedication to its principles. The federal bench needs people like him, one of the best lawyers the bar has to offer. We urge the Senate to confirm his nomination.

Sincerely,

Steven M. Umin
Williams & Connolly LLP
725 Twelfth St., N.W.
Washington, DC 20005
202-434-5047 (office); 202-434-5029 (fax); sumin@wc.com

R. William "Bill" Ide
McKenna Long & Aldridge, LLP
(President of the ABA, 1993-94)
303 Peachtree Street, NE, Suite 5300
Atlanta, GA 30308
404-527-4650 (office); 404-892-4667 (home)
404-527-4198 (fax); bide@mckennalong.com

Talbot "Sandy" D'Alemberte
President Emeritus
(Pr sident of the ABA, 1991-92)
Florida State University
Tallahassee, FL 32306
850-644-0800 (office); dalember@mailer.fsu.edu

WILLIAMS & CONNOLLY LLP

United States Senate
Committee on the Judiciary
June 14, 2004
Page 3

Dean Michael K. Young
George Washington University Law School
2000 H Street, N.W.
Washington, DC 20052
202-994-6288 (office); 703-532-9046 (home)
202-994-5157 (fax); myoung@law.gwu.edu

Homer E. Moyer, Jr.
Miller & Chevalier Chartered
655 15th Street, NW, Suite 900
Washington, DC 20005
202-626-6020 (office); 301-951-9595 (home)
202-628-0858 (fax); hmoyer@milchev.com

Professor Stephen A. Saltzburg
George Washington University Law School
2000 H Street, N.W.
Washington, DC 20052
202-994-7089 (office); 202-797-9028 (home)
202-994-9811 (fax); ssaltz@law.gwu.edu

Professor Thomas D. Morgan
George Washington University Law School
2000 H Street, N.W.
Washington, DC 20052
202-994-9020 (office); 703-312-0001 (home)
202-994-9811 (fax); tmorgan@law.gwu.edu

Jim Slattery
Wiley, Rein & Fielding
1776 K Street NW
Washington, DC 20006
202-719-7264 (office); 202-255-3102 (cell)
202-719-7049 (fax); jslattery@wrf.com

Kirk L. Jowers
Caplin & Drysdale
One Thomas Circle, N.W.
Washington, DC 20005
202-862-5057 (office); 202-429-3301 (fax); klj@capdale.com

WILLIAMS & CONNOLLY LLP

Trevor Potter
Caplin & Drysdale
One Thomas Circle, N.W.
Washington, DC 20005
202-862-5092 (office); 202-429-3301 (fax); tp@capdale.com

Gene C. Schaerr
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, DC 20005
202-736-8141 (office); 301-963-4122 (home)
202-736-8711 (fax); gschaerr@sidley.com

Jay T. Jorgensen
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, DC 20005
202-736-8020 (office); 703-255-4818 (home)
202-736-8711 (fax); jjorgensen@sidley.com

Ryan D. Nelson
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, DC 20005
202-736-8055 (office); 703-751-3198 (home)
202-736-8711 (fax); rnelson@sidley.com

L adership Conf renc on Civil Rights

1629 K Street, NW
10th Floor
Washington, D.C. 20006

Phone: 202-466-3311
Fax: 202-466-3435
www.civilrights.org

June 15, 2004

The Honorable Orrin G. Hatch
Chairman, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Member, Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senators Hatch and Leahy:

On behalf of the Leadership Conference on Civil Rights (LCCR), the nation's oldest, largest, and most diverse civil and human rights coalition, we write to express our grave concerns about the decision to proceed with a hearing on the nominations of David McKeague and Richard Griffin to the United States Court of Appeals for the Sixth Circuit.

As you know, both Senator Carl Levin, D-Mich., and Debbie Stabenow, D-Mich., object to committee consideration of the nominations of McKeague and Griffin. Proceeding with a hearing despite those objections is clearly contrary to previous committee policy. Under pre-2001 committee practice, the continued objection of even one home-state senator would have prevented further processing of the nominations.

The vacancies on the Sixth Circuit reflect the breakdown in the confirmation process. Moderate and well-qualified nominees sent to the Senate by President Clinton were never acted upon. Understandably, as the representatives of the interests of the people of Michigan in this process, Senators Levin and Stabenow object to the Senate leadership's decision to move forward on Bush administration nominations for those same seats -- including the June 16, 2004 hearing scheduled for David McKeague and Richard Griffin. The repeated pleas of Senators Levin and Stabenow for an opportunity to engage in real consultation with the White House in the selection of nominees for these seats have been rejected.

In addition to the concerns about the committee process, serious questions have also been raised about whether these nominees have records of commitment to the protection of civil rights. For example, in *Mauro v. Borgess Medical Center*, 886 F.Supp. 1349 (W.D. Mich. 1995), McKeague ruled that under the Americans with Disabilities Act a hospital was free to fire an HIV-positive employee rather than try to accommodate his disability by adjusting his job responsibilities. And in *United States v. Michigan*, 868 F.Supp. 890 (W.D. Mich. 1994), McKeague refused to permit the Justice Department to

investigate under federal law possible abuses at two state prisons for females, despite the fact that several other courts had specifically permitted such investigations and that the department had not been denied such access in more than a decade (Judy Putnam, *Judge Keeps Justice Dept. Officials Out of State Prisons Federal Officials Want to Investigate Conditions at Two Prisons for Women*, Grand Rapids Press, Oct. 7, 1994).

In *Wohlert Special Products, Inc. v. Michigan Employment Security Commission*, 527 N.W.2d 514 (Mich. 1994), the state supreme court reversed a decision written by Richard Griffin that harmed striking workers who were being replaced by permanent employees and contended that they were entitled to unemployment benefits under state law. And in *Doe and Roe v. Michigan Dep't. of Corrections*, 601 N.W.2d 696 (Mich. App. 1999), although Griffin recognized that clearly binding precedent required him to hold that federal and state disability law applied to prisoners, he argued strongly against that principle, and even urged Congress specifically to change the law. This raises serious questions about how Griffin would rule in cases involving civil rights and other issues where precedent is not so directly on point.

We are also generally concerned with the committee moving forward on controversial nominees, such as McKeague and Griffin -- as well as Thomas Griffith, Henry Saad, Brett Kavanaugh, William Haynes, and William Myers -- this late in an election year. As Senator Leahy has pointed out, the committee has for many years followed the so-called Thurmond rule, under which only non-controversial nominees are processed and approved during a presidential election year, particularly this late.

Given the procedural and substantive concerns with the nomination of McKeague and Griffin, any additional committee action on these nominations is clearly inappropriate at this time. If you have any questions or need further information, please contact Nancy Zirkin, LCCR deputy director/director of public policy at (202) 263-2880, or Julie Fernandes, LCCR senior policy analyst, at (202) 263-2856.

Thank you.

Sincerely,

Wade Henderson
Executive Director

Nancy Zirkin
Deputy Director/Director of Public Policy

cc: Senate Judiciary Committee

L ad rship Confer nc on Civil Rights

1629 K Street, NW
10th Floor
Washington, D.C. 20006

Phone: 202-466-3311
Fax: 202-466-3435
www.civilrights.org

June 22, 2004

The Honorable Orrin G. Hatch
Chairman, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy
Ranking Member, Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senators Hatch and Leahy:

On behalf of the Leadership Conference on Civil Rights (LCCR), the nation's oldest, largest, and most diverse civil and human rights coalition, we write to express our opposition to the confirmation of Thomas Griffith to the United States Court of Appeals for the District of Columbia Circuit. His views on equal education equity for women and girls, and the implication of those views for the continued vigorous enforcement of federal civil rights laws, compel us to conclude that Mr. Griffith is a poor choice for the federal appellate bench.

Title IX of the Education Amendments of 1972 bars sex discrimination by educational institutions that receive federal funding, including discrimination in their athletic programs. Title IX has increased opportunities for women and girls to play sports, receive college scholarships, and derive important health, emotional and academic benefits that come with participation in athletics.

Mr. Griffith served as a member of the Commission on Opportunity in Athletics ("Title IX Commission") created by Secretary of Education Roderick Paige in 2002 to evaluate whether and how current standards governing Title IX's application to athletics should be revised. The Commission made a series of recommendations that would have seriously weakened Title IX. Mr. Griffith supported the Title IX Commission's harmful recommendations. In addition, he offered a radical proposal to eliminate the "substantial proportionality" test for assessing compliance with the Act. This test, by allowing educational institutions to comply by offering athletic opportunities to male and female students that are in substantial proportion to each gender's representation in the student body of the school, is critical to the effectiveness of Title IX in the athletics arena. The proportionality test measures whether, in athletic programs that are segregated by sex, schools are providing female and male students with equal opportunities.

In arguing to abolish the proportionality test, Mr. Griffith claimed it violates the Equal Protection Clause of the Constitution and attacked it as "illegal, unfair and wrong"

(Transcript of Commission hearing, Jan. 30, 2003 at 26). All of the eight federal courts of appeal to consider this issue have refused to accept arguments like those put forth by Mr. Griffith. When other Commissioners pointed this out, Mr. Griffith showed disdain for the courts, declaring that all eight courts of appeal "got it wrong" (Transcript of Commission hearing, Jan. 30, 2003 at 27).

In the end, while the Commission was willing to adopt a number of proposals to weaken Title IX, Mr. Griffith's proposal was rejected by a vote of 11 to 4.

Mr. Griffith's approach to Title IX raises serious concerns about his approach to other critical components of the civil rights laws as well. For example, his opposition to what he calls "numeric measures" even in sex-segregated settings (like athletics), where they are simply a means of measuring discrimination in the allocation of opportunities, clearly suggests that he is hostile to numerical approaches to measuring and remedying discrimination in other contexts. These include affirmative action remedies for discrimination in employment or contracting, or the use of statistical evidence to prove that facially neutral practices have a disparate, adverse impact on racial minorities or women. These are key civil rights tools that are directly threatened by Mr. Griffith's analysis.

Finally, we are also troubled by reports that Mr. Griffith, for several years, practiced law in D.C. and Utah without a valid license. Mr. Griffith's lack of concern for the ethical rules that require up-to-date licensure for the legitimate practice of law reflects poorly on his judgment and his willingness to play by the rules.

For the reasons outlined above, we oppose the nomination of Thomas Griffith to the U.S. Court of Appeals for the D.C.Circuit. If you have any questions or need further information, please contact Nancy Zirkin, LCCR deputy director/director of public policy at (202) 263-2880, or Julie Fernandes, LCCR senior policy analyst, at (202) 263-2856.

Thank you.

Sincerely,

Wade Henderson
Executive Director

Nancy Zirkin
Deputy Director/Director of Public Policy

cc: Senate Judiciary Committee

Statement Of Senator Patrick Leahy
On The Nomination Of Thomas B. Griffith
To The United States Court Of Appeals For The D.C. Circuit
March 8, 2005

When we last met as a Committee for a hearing on the nomination of Thomas Griffith to the D.C. Circuit, it was a somewhat unusual hearing during a very brief post-election lame-duck session of Congress to consider a controversial nominee to the second highest court in the country. At the time, I thought that through working together there were a number of relatively noncontroversial judicial nominations on whom we might have been able to make progress. But there appeared to be little interest from the Republican majority in seizing that opportunity for progress. And what I have become convinced of since that time is that this White House continues to seek unnecessary confrontation over judicial nominees by renominating troublesome choices such as this one.

Four years ago, after Senate Republicans had abused their power to prevent more than 60 moderate and qualified judicial nominations of President Clinton from being considered and confirmed, I nonetheless urged this White House and Senate Republicans to work with all Senators to fill judicial vacancies. I pressed forward in the 17 months I chaired the Judiciary Committee to put the Senate in position to confirm 100 of President Bush's lifetime appointments to the federal courts. I tried to meet Republicans half way by making and fulfilling commitments to do what Republicans had not done, and we held hearings on even some of President Bush's most controversial nominees. For all of our efforts we were rewarded with vilification and personal attacks.

Over the last two years the Bush Administration continued down its course of politicizing judicial nominations. The Senate Republican leadership has abandoned its responsibilities to the Senate in this regard, choosing, instead, to serve as a wholly-owned subsidiary of the White House in their effort to turn the federal judiciary into an arm of a particular ideological wing of the Republican Party. Over the last two years Senate Republicans bent, broke or ignored our traditional rules governing Committee consideration of judicial nominees. This year Senate Republicans are working to exercise the "nuclear option" to destroy the one Senate rule left that allows the minority any protection. Changing the rules to remove the threat of the filibuster, which has allowed the Senate to serve as a check on a powerful Executive, would destroy the Senate, undermine the independence and fairness of the federal judiciary, and lead to a rollback of the rights and freedoms of the American people.

At the beginning of this Congress the new Senate Democratic Leader reached out to the White House and offered an olive branch and cooperation. His good efforts have likewise been spurned by the White House, which remains intent on seeking confrontation over reconciliation.

Just last week the Senator from Colorado sent a letter to the President urging that we join in common cause on these matters and suggesting that the President make a show of good faith by ratcheting down the conflict by withdrawing those divisive judicial nomination on which the Senate has previously withheld its consent. He offered President Bush some wise counsel noting that "the decision to re-nominate these individuals will undoubtedly create the animosity and divisiveness between the President and the Unites States Senate as an institution that is not helpful to our Nation and will sidetrack our collective efforts to work on other crucial matters." It was a sensible suggestion. It, too, has been rejected out of hand by a White House that seeks absolute authority and seeks to undermine the checks and balances that have served for 200 years to protect our rights and our democracy.

Unlike the many anonymous Republican holds and pocket filibusters that kept scores of President Clinton's qualified judicial nominees from moving forward, the concerns about Mr. Griffith are no secret. He knows full well my concern that he has not honored the rule of law by practicing law in Utah for five years without ever bothering to fulfill his obligation to become a member of the Utah Bar. I assume he has by now obtained a Utah driver's license and that he pays Utah State taxes. But he is not yet a member of the Utah Bar, despite practicing law there since 2000.

I will be interested to learn what steps Mr. Griffith took since our last hearing to take the Utah Bar examination recently held in February or to apply for the Utah Bar examination next scheduled to take place this summer. By one count, Mr. Griffith has so far foregone 10 opportunities to take the Utah Bar exam while applying for and maintaining his position as General Counsel at BYU. This conscious and continuous disregard of basic legal obligations is not consistent with the respect for law we should demand of lifetime appointments to the federal courts. He has yet to explain why he obstinately insists on refusing to do what hundreds of lawyers do twice a year in Utah and thousands of lawyers do around the country: Apply for and take the state bar exam and qualify to become a member of the state bar in order to legally practice law.

As was reported last summer in *The Washington Post*, and confirmed through Committee investigation, Mr. Griffith has spent the last five years as the General Counsel to Brigham Young University. In all that time he has not been licensed to practice law in Utah, nor has he followed through on any serious effort to become licensed. He has hidden behind a curtain of shifting explanations, thrown up smokescreens of letters from various personal friends and political allies, and refused to acknowledge what we all know to be true. He should have taken the bar. He should be a member of the Utah Bar.

Practicing law without a license, or as the bars call it, unauthorized practice of law, is not a technicality like forgetting to pay your bar dues. In some States it is a crime. In Texas, for example, it is a third-degree felony. It is a serious dereliction of a lawyer's duty. It is a commonplace of American jurisprudence that no one is above the law. If the American people are to have confidence in our system of laws, that must include the lawyers, and beyond question, it must include the judges. I hope today that we will hear better, more coherent and more forthright answers from Mr. Griffith about the problems with his bar

memberships. I would expect those answers to start with a commitment to do what is now long overdue -- namely, to take the Utah Bar exam and become properly licensed to practice law in Utah, where Mr. Griffith has been practicing law for the last five years.

When this process of examining Mr. Griffith's record and qualifications began last May, I had a few questions for him. Now, after significant staff investigation, one Committee hearing and an extensive round of written questions and answers, I have even more questions for him which require careful examination and deliberation. His answers to Senators' written questions submitted after his hearing raised still more questions.

In addition to that threshold matter of practicing law without being a member of the Utah Bar, there are other reasons for serious concern among many about Mr. Griffith's fitness to be a member of the United States Court of Appeals for the District of Columbia Circuit. He has spoken in Federalist Society circles of his judgment that President Clinton was properly impeached and that he would have voted for his conviction and removal from office. Given his role as Senate Legal Counsel at the time, these public musings are unseemly and unsound. Rather than campaigning for this nomination and placing himself in the minority of Senators, Mr. Griffith would have better spent his time preparing for and taking the Utah Bar exam. His judgment is likewise brought into question by his views on Title IX of our civil rights laws.

This charter of fundamental fairness has been the engine for overcoming discrimination against women in education. It is best known as the foundation of the growth of women's athletics in this country. I urge all Senators to think about our daughters and granddaughters, the pride they felt when the U.S. women's soccer team began winning gold medals and world cups, the joy they see in young women with the opportunity to play basketball and ski and compete and grow. I urge each Senator to listen to the words of Julie Foudy and to consider the sincere opposition of the National Women's Law Center and so many women's organizations to this nomination before they vote in a way that will serve to turn back the clock on women's rights and equality.

In the 17 months I chaired the Committee, we went forward with the first hearing on a nominee to the D.C. Circuit in three years. Had the Administration shown anything approaching the level of traditional cooperation with the Senate, that nominee would have received an up or down vote. Given the Administration's stonewalling, the Senate withheld consent to the nomination of Miguel Estrada. The Republican blockage against President Clinton's moderate and qualified nominees to the D.C. Circuit was never abandoned. Nonetheless, in another reconciliatory effort by Democrats, we did proceed to consider and confirm a Bush nominee to the D.C. Circuit in 2003. That effort has not been reciprocated in any way. With respect to judicial nominations, it appears that no good deed by Senate Democrats goes unpunished. I have urged this President for more than four years to send us a balanced package of nominees to this important court. He refuses.

It is ironic given that President Bush recently spoke so eloquently about the fundamental requirements of a democratic society when he met with President Putin

of Russia. He acknowledged there at that meeting something that partisan Republicans are desperately seeking to undermine here -- that we rely on the sharing of power, on checks and balances, on an independent court system, on the protection of minority rights, and on safeguarding human rights and human dignity. The President recently promised the American people in a radio address in this country that he would serve all Americans and would "work to promote the unity of our great nation." I commend that sentiment but wish the President and Senate Republicans would work to fulfill that promise. His renomination of controversial judicial nominees already considered by the Senate is inconsistent with that promise and undercuts the fundamental principles that protect our democracy. Their insistence on deploying the nuclear option is an affront that will further undermine unity and fundamental safeguards of the rights and freedoms of Americans.

The confrontational approach of this Administration is unnecessary and unwise. Senate Republicans' insistence that this President be given carte blanche in his efforts to pack the federal courts and that the Senate become a rubberstamp and give up its distinctive protection of minority rights is shortsighted at best. It is most unfortunate that this White House persists in its single-minded effort to pack the federal courts. It is unfortunate that the Senate Republican leadership is acting as an arm of the Administration rather than on behalf of the Senate and providing the checks and balances on which our democracy and our freedoms depend.

As Senator Reid and Senator Salazar have recently suggested, if the Bush Administration would work with us, we could reach consensus on nominees to fill the current judicial vacancies. There are currently 24 judicial vacancies without nominees, including eight for circuit courts around the country. There are several more for which we could be working together to find consensus on rather than the divisive nominees before us. I wish the Republican Administration and the Republican Leadership in the Senate would work with us to find consensus nominees, experienced, qualified, fair men and women who could garner virtually unanimous support.

The only new judicial nomination received all year is such a nominee. Brian Edward Sandoval, a nominee to the District Court in Nevada, is a nominee with the support of both his home-state Senators, one Republican and the other the Senate Democratic Leader. When we had a vacancy on the Second Circuit from Vermont, I joined with the Republican Governor and Senator Jeffords in recommending and supporting Peter Hall. Unfortunately, this Administration too often chooses not to follow the path of consensus but, instead, seeks to serve the interests of a narrow partisan wing of their political party over the interests of the American people.

This hearing marks the third hearing on the President's controversial circuit court nominations in barely more than a week. Chairman Specter is affording some of these nominees, including Mr. Griffith, another opportunity to provide the Committee and the Senate with additional information and assurance that they have earned and merit the consent of the Senate to their lifetime appointment as a custodial of the rights of all Americans. I thank the Chairman for following the proper order of the Committee in that, but it is Mr. Griffith's refusal to follow proper order in taking the bar that remains a lingering concern over this nomination.

The Honorable Orrin Hatch, Chair
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Patrick Leahy, Ranking Member
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510

June 21, 2004

Dear Chairman Hatch and Senator Leahy,

Since 1970, Legal Momentum (formerly NOW Legal Defense and Education Fund) has pursued equality and economic justice for women and girls in the workplace, the schools, the family and the courts through litigation, education, public information programs and advocacy. We write to urge you to oppose the nomination of Thomas B. Griffith to the U.S. Court of Appeals for the District of Columbia Circuit. Griffith's record raises serious alarm about his interpretation of key constitutional and statutory rights, specifically with regard to Title IX of the Education Amendments of 1972.

In 2002, Griffith served as member of the Commission on Opportunity in Athletics created by Secretary of Education Roderick Paige to evaluate whether and how current standards governing Title IX's application to athletics should be revised. The Commission made several recommendations that would have critically weakened Title IX. Griffith not only joined in supporting the Commission's harmful recommendations, he offered the most dangerous proposal of all. He proposed to abolish the "substantial proportionality" test for compliance—a crucial element in the effectiveness of Title IX in athletics.

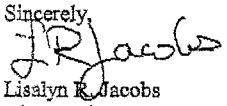
Although Griffith's proposal was ultimately rejected by the Commission, he argued that the proportionality test violates the Equal Protection Clause of the Constitution and described the test as "illegal," "unfair," and "morally wrong." Eight Circuit Courts—every one to consider the issue—have refused to accept this argument. Griffith later commented that "the courts got it wrong" and "I don't believe in the infallibility of the Judiciary." Title IX prohibits discrimination based on gender and marital or parental status in admissions, housing, courses, career counseling, financial aid, student health benefits, and athletics. His record clearly demonstrates hostility toward women's educational equity.

As a women's rights advocacy organization, Legal Momentum is concerned that Griffith's views of Title IX may be an example of his overall approach to civil rights law. Griffith

opposes "numeric measures" even in sex-segregated settings, where they are simply a means of measuring discrimination in the allocation of opportunities—suggesting that he may be similarly opposed to numerical measures in other settings. Griffith's analysis would therefore threaten affirmative action remedies for discrimination in employment or contracting, or statistical evidence to prove that employment practices have a disparate, adverse impact on women or racial or ethnic minorities.

The U.S. Court of Appeals handles thousands of cases per year, the majority of which have the final say on many laws and on the U.S. Constitution. For this reason, Bush's judicial nominees must be scrutinized and assurances must be given that they will not attempt to undermine women's rights. These are lifetime positions, so many of the appointments made now will have effects that last for decades. Judicial candidates' positions on issues affecting women must be considered a crucial part of their qualifications. Thomas Griffith is unacceptable by that measure and must therefore be rejected.

Sincerely,



Lisalyn R. Jacobs
Vice President of Government Relations

Cc: Members of the Senate Judiciary Committee

Stanford ATHLETICS
Home of Champions

Department of Athletics
Stanford University
Stanford, CA 94305-6150
www.gostanford.com

June 30, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United State Senate
223 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman,

I write to support the nomination of Thomas B. Griffith for the United States Court of Appeal for the District of Columbia Circuit. I have known Mr. Griffith for a little over two years and we met when we served as Commissioners of the "Secretary's Commission on Opportunities in Athletics". As Co-Chair, I had the opportunity to observe Mr. Griffith in a number of different situations and can recommend for the U.S. Court of Appeal without reservation!

The Commission on Opportunities in Athletics had a tough job: to evaluate, after 30 years, Title IX's effectiveness in serving the American public and to see if there were any "consensus" ways the government could adjust its administration to make the law even more beneficial. During our numerous public meetings, I found Mr. Griffith not only a diligent commission member but a staunch supporter of Title IX. While Mr. Griffith and other commission members engaged in spirited public debate regarding the many public policy issues associated with the implementation of equal athletic opportunities for women, Mr. Griffith was consistent in his support of the law.

The report of our commission submitted to the Secretary of Education in February of 2003, strongly supported the law and its general implementation and interpretations that had developed since 1979. In fact, our report led directly to a further "clarification letter" to be issued by the Secretary of Education and Office of Civil Rights in the summer of 2003 which further strengthened the government's commitment to Title IX, equal opportunities for women, and its enforcement policies. It was a victory for all who believe in equal opportunity!

Mr. Griffith served the American people with thoughtfulness, courage and integrity during his time on the commission and I am proud to have shared this duty with him. In fact, I think Mr. Thomas Griffith is exactly the kind of courageous and thoughtful citizen we need serving on the federal bench.

Sincerely,

Ted

Ted Leland
The Jaquish & Kenninger
Director of Athletics

TL/jc

cc: The Honorable Patrick J. Leahy
Office of Legal Policy

RANDY T. AUSTIN
LORIN C. BARKER
ANTHONY L. BENTLEY, JR.
ROLF H. BERGER
JASON BEUTLER
BRYAN N. BOOTH
BERNE S. BROADBENT*
DIANE D. CARD
THOMAS K. CHECKETTS
CHRISTIAN S. COLLINS
CHARLES W. DAHLQUIST, II
JERRY W. DEARINGER
ALEXANDER DUSHKU#
ROBERT W. EDWARDS
JAMES E. ELLSWORTH
WALLACE O. FELSTED
R. BRUCE FINDLAY
STEPHEN W. GEARY#
JULIE H. GHEEM*
CONAN P. GRAMES*
CHAD A. GRANGE
DAVID J. HARDY
BENSON L. HATHAWAY, JR.
READ R. HELLEWELL
CHRISTOPHER S. HILL#
KENNETH E. HORTON
KATHERINE K. HUDMAN
DALE E. HULSE*
LEE FORD HUNTER
ROBERT C. HYDE
RANDY K. JOHNSON#
RICHARD G. JOHNSON, JR.
VON G. KEETCH
RAEBURN G. KENNARD
MICHAEL F. KRIEGER*
KARINA F. LANDWARD
ROMAINE C. MARSHALL
DANIEL B. MCCONKIE
DAVID M. MCCONKIE
OSCAR W. MCCONKIE

KIRTON & McCONKIE
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
1800 EAGLE GATE TOWER
60 EAST SOUTH TEMPLE
SALT LAKE CITY, UTAH 84111-1004
P.O. BOX 45120
SALT LAKE CITY, UTAH 84145-0120
TELEPHONE (801) 328-3600
TOLL FREE 1 (866) 867-5125
UTAH COUNTY (801) 223-9666
FAX (801) 321-4893
www.kmclaw.com

OSCAR W. MCCONKIE, III
DANIEL J. MCDONALD
LYNN C. MCMURRAY
SAMUEL D. MCVEY
WILLIAM A. MEADERIS, JR.
THOMAS A. MECHAM
THOMAS L. MONSON
DENIS R. MORRILL
ALEXIS V. NELSON*
MERRILL F. NELSON
RICHARD R. NESLEN
ERIC G. OLSON
R. WILLIS ORTON
ALISSA R. OWEN*
S. BRANDON OWEN
MELINDA R. POHTER
ROBERT S. PRINCE
MATTHEW K. RICHARDS
MYRON L. SORENSEN
DAVID B. TINGEY*
JON E. WADDOUPS
DAVID M. WAHLQUIST
THOMAS D. WALK
ROBERT R. WALLACE
STUART F. WEED
DAVID A. WESTERBY*
TIMOTHY M. WHEELWRIGHT
STEVEN L. WHITEHEAD
LEE A. WRIGHT
TODD E. ZENGER*

OF COUNSEL:
MICHAEL CHEN#&
COLE DURHAM
HISAKA YAMAMOTO

* REGISTERED PATENT ATTORNEY
* LICENSED TO PRACTICE ONLY IN CALIFORNIA
# ALSO LICENSED TO PRACTICE IN CALIFORNIA
& ALSO LICENSED TO PRACTICE IN CHINA

WILFORD W. KIRTON
(1922-2004)

June 21, 2004

The Honorable Orrin G. Hatch (Fax) 202-228-1698
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington DC 20510

RE: Support for Confirmation of Thomas Griffin

Dear Mr. Chairman:

As you know, I am the Chairman of the Board of Directors of Kirton & McConkie, one of the major law firms in the Intermountain West. I have practiced law in the State of Utah and in the Federal Courts for more than fifty years.

I am writing to urge the confirmation of Thomas Griffith to the United States Second Circuit Court of Appeals.

I know Thomas Griffith. He is eminently well qualified to be a circuit court justice. He has the proper judicial temperament. He has a broad understanding. He is presently the General Counsel for the largest private university in the United States. You and the Judiciary Committee know of his service to the United States Senate.

Thomas Griffith and I are not of the same political party. I am the former President of the Utah State Senate as a Democrat. He is a Republican. This should not have anything to do with his confirmation. He is a man of reasoned judgment. He has a reputation for fairness and integrity. All who know him respect him.

In my opinion, Thomas Griffin is an ideal candidate for confirmation to such an important post. I think his confirmation is in the best interests of the Federal Judiciary.

Sincerely,

KIRTON & McCONKIE

Oscar W. McConkie

OWM:cb
cc: Honorable Patrick J. Leahy
Office of Legal Policy

MALDEF
Mexican American Legal Defense and Educational Fund

Washington, D.C. Regional Office
1717 K Street, NW
Suite 311
Washington, DC 20036
Tel: 202.293.2828
Fax: 202.293.2849

National Headquarters
Los Angeles Regional Office
634 S. Spring Street
Los Angeles, CA 90014
Tel: 213.629.2512
Fax: 213.629.0266

Atlanta Regional Office
41 Marietta Street
Suite 1000
Atlanta, GA 30303
Tel: 678.559.1071
Fax: 678.559.1079

Chicago Regional Office
155 W. Randolph Street
Suite 1405
Chicago, IL 60601
Tel: 312.782.1422
Fax: 312.782.1428

San Antonio Regional Office
140 E. Houston Street
Suite 300
San Antonio, TX 78205
Tel: 210.224.5476
Fax: 210.224.5382

Sacramento Satellite Office
926 J Street
Suite 422
Sacramento, CA 95814
Tel: 916.443.7531
Fax: 916.443.1541

Houston Program Office
Ripley House
4410 Navigation
Suite 229
Houston, TX 77011
Tel: 713.315-6494
Fax: 713.315-6404

November 15, 2004

United States Committee of the Judiciary
The United States Senate
Washington, DC 20510

Subject: **Thomas B. Griffith, D.C. Circuit Court of Appeals**

Dear Honorable Senator:

I write to you on a matter of great importance to the Latino community in the U.S. Since 1968, the Mexican American Legal Defense and Educational Fund (MALDEF) has worked to protect and promote the civil rights of the more than 40 million Latinos in the U.S. As an organization dedicated to safeguarding those core constitutional and statutory rights upon which many of the Latino community's social, political and economic gains have been predicated, MALDEF strongly urges the U.S. Senate Judiciary Committee not to approve the nomination of Thomas B. Griffith to the U.S. Court of Appeals for the D.C. Circuit.

MALDEF recognizes and values the significance of the federal judiciary in maintaining our nation's democratic form of government and in protecting the most precious rights for all Latinos because of the unique role that the federal courts have in our nation's three branch system and because the federal courts have often functioned as the last place of refuge for the most vulnerable populations. Appointments to the circuit courts occupy an even more prominent place since the U.S. Supreme Court hears fewer than a hundred cases per year. Thus, the nation's circuit courts are often the last arbiters in determining the rights of individuals and communities. Among the circuit courts, the DC Circuit is second in importance only to the U.S. Supreme Court because its expansive jurisdiction includes federal agency actions, from regulatory matters to the orders and decisions of various Commissions and Boards.

When evaluating judicial nominations, MALDEF applies a set of criteria with an eye towards protecting those rights that are important to all U.S. Latinos, citizen and noncitizen alike. Beyond the minimum requisite of honesty, respect, character, temperament and intellect, MALDEF's criteria also includes examining whether the nominee has a demonstrated commitment to protecting the rights of ordinary persons and to preserving and expanding the progress that has been made on civil rights and individual liberties. Of particular weight is whether a nominee has affirmatively protected the right of access to the courts, to have a neutral decision maker hear the bare facts of a case.

In examining the public record of judicial nominee Thomas B. Griffith, MALDEF has concluded that the nominee fails our criteria of protecting and promoting the civil rights of the Latino community. Griffith's aggressive attacks on Title IX of the Education Amendments of 1972, a landmark federal law that bars sex discrimination by educational institutions that receive federal funding and that has provided tremendous opportunities

for girls and women, including Latinas, raise broad concerns about his approach to Title IX and to other civil rights protections and remedies outside the context of Title IX. Additionally, no judicial nominee is presumptively entitled to confirmation and Griffith's failure to maintain a bar license while practicing law represents a failure of significant consequence for any practicing attorney and should be viewed as such for any judicial nominee to a lifetime appointment to the federal bench.

Griffith's Failure to Maintain a Bar License while Practicing Law

According to Griffith's Senate Judiciary Committee Questionnaire, Griffith disclosed that his membership to the District of Columbia bar "lapsed for non payment of dues on November 30, 1998 due to a clerical oversight, but was reinstated on November 13, 2001."[1] During the three years that Griffith failed to pay the required fees, he was practicing law in Washington D.C. In his judiciary questionnaire, Griffith identifies as a "significant litigated matter" the high profile impeachment trial of President William Jefferson Clinton, in 1998-1999, where his "role was to advise the Senate leadership, its members, officers, and employees how to conduct an impeachment trial consistent with the Constitution, Senate rules and precedent, and judicial decisions"[2] as well as Clinton v. City of New for 1998.[3] Moreover, Griffith indicated on his Judiciary Questionnaire that among his most significant legal activities was his work during 1999-2000 as general counsel to the Advisory Commission on Electronic Commerce.[4] In this capacity, Griffith advised the "Chairman and the Commission members on the law governing congressional commissions, [and] the application of the statutory language creating the Commission to it's work..."[5] Griffith's bar lapse also overlapped during his one-year return to private practice as a partner at Wiley, Rein and Fielding in 1999-2000. In summary, Griffith practiced law in Washington, D.C. without a D.C. bar license for approximately three years.

The bar licensing failure does not end with Griffith's reinstatement to the D.C. bar in November of 2001. In 2000, Griffith accepted the General Counsel position with Brigham Young University, and practiced law in Utah for four years without having a Utah bar license.[6] Griffith did recognize that he needed to establish Utah bar membership to serve as General Counsel for Brigham Young University, and he registered to sit for the Utah bar exam, but ultimately did not take the examination.[7] Griffith could not gain a reciprocal state license because he failed to meet the Utah bar requirement of being in good standing as an attorney in the previous jurisdiction he was practicing in for three of the previous four years. Griffith could not avail himself of Utah's reciprocity because he let his D.C. bar membership lapse between November of 1998 through November of 2001.[8] According to Brigham Young University's website, the General Counsel is responsible for advising

---

[1] SENATE JUDICIARY COMMITTEE QUESTIONNAIRE OF THOMAS B. GRIFFITH, at 4.
[2] *Id.* at 10.
[3] *Id.* at 11.
[4] *Id.* at 16.
[5] *Id.* at 16.
[6] Carol D. Leonnig, "*Judicial Nominee Practiced Law without a License in Utah*," WASHINGTON POST, June 21, 2004 at A1.
[7] *Id.*
[8] *Id.*

the administration in "all legal matters" and, "prepares legal documents of all kinds," and also directs and manages all litigation involving the University.[9]

While the D.C. bar and the Utah bar have yet to formally investigate or discipline Griffith, what is clear is that Griffith practiced law while in Washington D.C. for nearly three years, and practiced in Utah during his first year as General Counsel for a minimum of one year without being a member of any bar. On Griffith's Judiciary Questionnaire, he cites a clerical oversight for his D.C. bar membership lapse, but such disregard for licensing requirements for a several period is an oversight of significant magnitude and goes beyond "clerical error." Mark Foster, a lawyer specializing in legal ethics is quoted as saying,

> This moves it for me from the realm of negligence to the realm of willfulness. People who thumb their noses at the rules of the bar shouldn't be judges.[10]

Griffith's "radical" animosity to Title XI

MALDEF is profoundly troubled by Griffith's aggressive attacks on Title IX of the Education Amendments of 1972. Griffith's self-described "radical" [11] animosity towards Title IX's *substantial proportionality* standard suggests he would not enforce Title IX regardless of invidious discrimination by an educational institution failing to provide equity to both sexes, despite both legal precedent and this Administration's support of current implementation of Title IX.[12] As evidence of this animosity, Griffith told the Commission that the eight circuit courts that upheld the substantial proportionality prong of Title IX "got it wrong."[13] Indeed, Griffith's hostility towards the legal reasoning of the eight circuit courts is so extreme that he places these decisions on a level akin to the darkest decisions in this country's history, "Dred Scott v. Sanford[14] and Plessy v. Ferguson."[15] Griffith's views on Title IX place him far outside the mainstream and, in fact, his "radical" proposal was rejected by the Title IX Commission itself on a vote of 11-4.

Griffith's myopic opposition to the use of statistical evidence to show that facially neutral practices have a disparate or adverse impact on women in the context of Title IX and his continual reference to such as "numeric formulas" is a strong indication that he would be hostile to many traditional equitable protections and affirmative remedies in the areas of employment, contracting and education. Griffith's attack on *substantial proportionality,* which is widely viewed as a flexible compliance standard, indicates that Griffith would likely oppose affirmative action efforts in employment, contracting, and education as well as other well-established uses of statistical evidence to show that facially neutral practices have a disparate, adverse impact on racial and ethnic minorities or women. Griffith has stated a firm belief that the use of numeric formulas are a "fundamentally unfair way of going about remedying discrimination"[16] and squarely places *substantial proportionality* measures therein, despite the flexibility that such approaches have permitted colleges and universities and despite its success in expanding opportunities for all girls and women, including

---

[9] *See* BRIGHAM YOUNG UNIVERSITY WEBSITE, Resources for Scholarships, Office of General Counsel, *available at* http://www.byu.edu/fc/pages/scholpages/schresou.html.

[10] Supra note 5 at A1.

[11] Thomas B. Griffith, Remarks at the 43rd Annual Conf. of National Assn. of College and Univ. Attorneys (June 22, 2003), (discussing his work on the Commission to the conference, Griffith stated, "There was only one radical proposal that was offered, and I offered it, and it lost. I offered a proposal to get rid of substantial proportionality. I could only get 4 votes out of the Commission and so it went down in flames...").

[12] UNITED STATES DEPARTMENT OF EDUCATION OFFICE OF CIVIL RIGHTS, Policy Guidance Letter, available at http://www.ed.gov/about/offices/list/ocr/title9guidanceFinal.html.

[13] TRANSCRIPT of the January 30, 2003 hearing of the Commission on Opportunity in Athletics, at 28.

[14] *See* Dred Scott v. Sanford, 60 U.S. 393 (1856) (holding that a member of the African race cannot be a citizen of the United States); TRANSCRIPT, *supra* note 12, at 106.

[15] *See* Plessy v. Ferguson, 153 U.S. 537 (1896) (upholding state-imposed racial segregation); TRANSCRIPT, *supra* note 12, at 106.

[16] TRANSCRIPT, *supra* note 12, at 107.

Latinas. Griffith's argument that numeric formulas are "morally wrong,"[17] "logically flawed,"[18] "unfair,"[19] and "illegal"[20] is extreme and antithetical to safeguarding the rights that many Latinos have relied upon in overcoming illegal, prevalent systemic discrimination and in providing opportunities to our community.

Conclusion

Griffith's extreme views of the *substantial proportionality* prong of Title IX give every indication that Griffith would act to dismantle Title IX and constitutional and statutory protections outside the context of Title IX that are of great significance to the Latino community. And, while Griffith characterizes his failure to maintain a bar license as a "clerical oversight," MALDEF recognizes this oversight as a failure of the most basic requirements of honesty, integrity, character and respect for the profession of law.

As such, MALDEF opposes the confirmation of Thomas B. Griffith to the D.C. Court of Appeals and urges that you stand with us in safeguarding the rights of the Latino community by not approving his nomination.

Sincerely,

Ann Marie Tallman

Ann Marie Tallman
President and General Counsel

[17] *Id.* at 27.
[18] *Id.* at 27.
[19] *Id.* at 27.
[20] *Id.* at 27.

Congress of the United States
Washington, DC 20515

July 6, 2004

The Honorable Orrin Hatch, Chair
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Patrick Leahy, Ranking Member
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senators Hatch and Leahy,

We, the undersigned Members of Congress, write to express our deep concerns about the nomination of Tom Griffith to the Court of Appeals for the District of Columbia Circuit. Upon careful consideration of his record, it becomes evident that Mr. Griffith questions the value of civil rights laws such as Title IX of the Education Amendments of 1972, and his legal opinion of Title IX is out of touch with both settled law and the Bush Administration's recent decision concerning Title IX athletics policies.

As a member of the Department of Education's Commission on Opportunity in Athletics - which considered possible changes to regulations governing athletics under Title IX – Mr. Griffith was one of the most outspoken opponents of Title IX. Mr. Griffith offered what even he recognized were "radical" proposals to change Title IX athletics policies. Mr. Griffith expressed open animosity towards the eight circuit court decisions upholding Title IX, placing them on a scale of error akin to those in the *Dred Scott v. Sanford* and *Plessey v Ferguson* decisions. In strong disagreement with Mr. Griffith's animosity to Title IX and its clear, flexible, and constitutional standards, the Department of Education's Office of Civil Rights (OCR) issued a letter rejecting the Commission's recommendations that Title IX be weakened, and affirmed the value and fairness of Title IX's existing regulations.

We are concerned that – given a lifetime tenure on the D.C. Circuit Court – Mr. Griffith could and would work to undermine Title IX and would undo the progress it has made for women and girls in this country. Based on his record, we question his ability to enforce critical constitutional and statutory rights – well-established through regulation and judicial history – should they differ from his own well defined, publicly stated views.

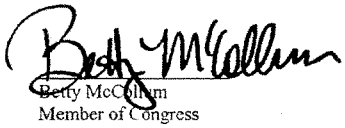
As defenders of Title IX and all civil rights laws ensuring basic equity, we believe the nominee possesses neither the credentials nor the respect for precedent to ensure fairness and justice for women and girls. We respectfully encourage you to consider these concerns when weighing the worth of nominee Tom Griffith to the D.C. Circuit Court of Appeals.

Sincerely,

Rosa L. DeLauro
Member of Congress

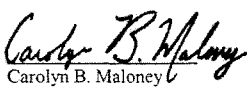
Louise M. Slaughter
Member of Congress

Cc: Members of the Senate Judiciary Committee

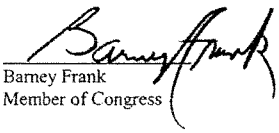


Betty McCollum
Member of Congress

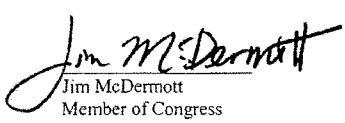
Carolyn McCarthy
Member of Congress



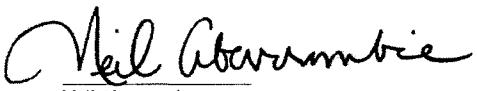
Carolyn B. Maloney
Member of Congress



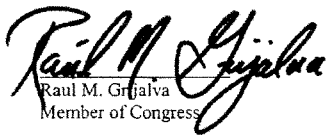
Barney Frank
Member of Congress



Jim McDermott
Member of Congress

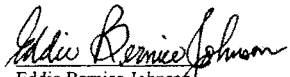


Neil Abercrombie
Member of Congress

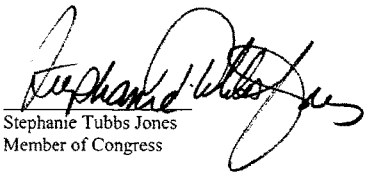


Raul M. Grijalva
Member of Congress

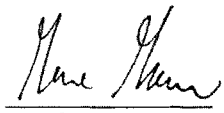
Tammy Baldwin
Member of Congress



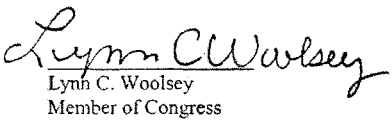
Eddie Bernice Johnson
Member of Congress



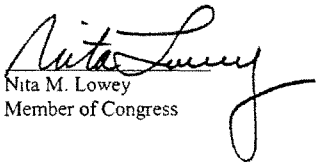
Stephanie Tubbs Jones
Member of Congress



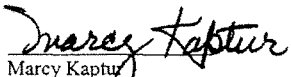
Gene Green
Member of Congress



Lynn C. Woolsey
Member of Congress



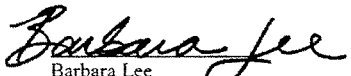
Nita M. Lowey
Member of Congress



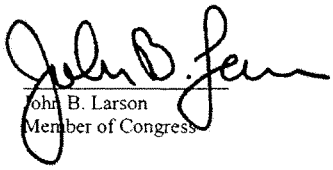
Marcy Kaptur
Member of Congress

Sherrod Brown
Member of Congress

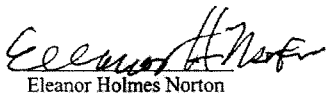
Hilda L. Solis
Member of Congress



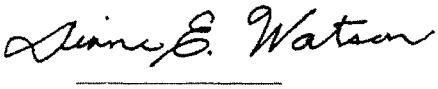
Barbara Lee
Member of Congress



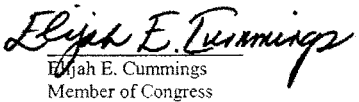
John B. Larson
Member of Congress



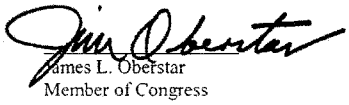
Eleanor Holmes Norton
Member of Congress



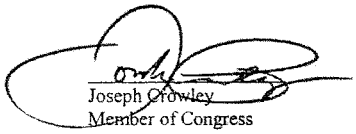
Diane E. Watson
Member of Congress



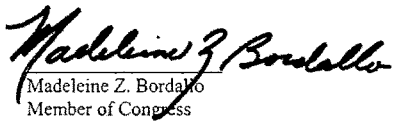
Elijah E. Cummings
Member of Congress



James L. Oberstar
Member of Congress

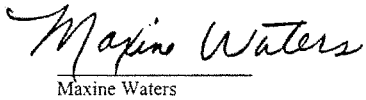


Joseph Crowley
Member of Congress

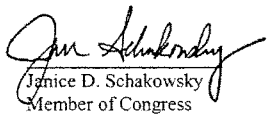


Madeleine Z. Bordallo
Member of Congress

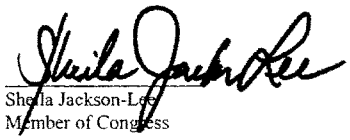
Dennis J. Kucinich
Member of Congress



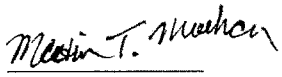
Maxine Waters
Member of Congress



Janice D. Schakowsky
Member of Congress



Sheila Jackson-Lee
Member of Congress



Marty T. Meehan
Member of Congress

Tom Lantos
Member of Congress

Corrine Brown
Member of Congress

Chris Van Hollen
Member of Congress

July 2, 2004

Brigham Young University

Women's Intercollegiate Athletics

Elaine Michaelis
Director

228-B Smith Fieldhouse
Provo, UT 84602
Phone 801-422-4225
Fax 801-422-0697
Email elaine_michaelis@byu.edu

Teresa Peugnet
Assistant Controller

229 Smith Fieldhouse
Provo, UT 84602
Phone 801-422-6165
Fax 801-422-0697
Email teresa_peugnet@byu.edu

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510
Fax: 202-228-1698

Dear Mr. Chairman:

It is my understanding that President Bush has nominated Thomas Griffith to be a federal appeals court judge. As a colleague of Mr. Griffith at Brigham Young University, I have had the opportunity to work with him and know of his abilities, values and professional expertise. He is a man of integrity, rational thinking and commitment to the principles representative of the individual freedoms and beliefs upon which this country were founded. Tom has excellent interpersonal skills, intelligence, and professional expertise to handle the demands of his profession at any level.

As the Executive Director of Women's Athletics at Brigham Young University, I have been involved with the Title IX Compliance process of the University. As General Counsel at the University, Mr. Griffith has provided legal assistance in this effort. The University is now essentially in compliance with Title IX. The General Counsel has been very helpful to the administration as they provided the support needed to comply with the law.

Tom has been very supportive of our women's athletic program, the coaches, and the athletes. I believe he is committed to women and minorities and to fairness in all aspects of the law. He is a critical thinker and will explore new avenues to meet the needs of the people he serves.

Tom Griffith is a great American and would serve the Country well as a federal appeal court judge. I have no reservation in recommending him for this position. He is qualified and committed to the ideals a judge should possess.

If I can be of any assistance, please contact me.

Sincerely,

Elaine Michaelis
Executive Director
BYU Women's Athletics

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510
Fax: 202-224-9516

Office of Legal Policy
United States Department of Justice
Fax: 202-514-5715

Brigham Young University

Women's Intercollegiate Athletics

Elaine Michaelis
Director

228-B Smith Fieldhouse
Provo, UT 84602
Phone 801-422-4225
Fax 801-422-0697
Email elaine_michaelis@byu.edu

Teresa Peugnet
Assistant Controller

229 Smith Fieldhouse
Provo, UT 84602
Phone 801-422-6165
Fax 801-422-0697
Email teresa_peugnet@byu.edu

100 YEARS
THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL
A Century of Ideas and Action

1111 East 60th Street | Chicago, Illinois 60637
PHONE 773-[redacted] | FAX 773-702-0730
E-MAIL amikva@law.uchicago.edu
www.law.uchicago.edu

Abner Mikva
Visiting Professor

June 8, 2004

Letters to the Editor,
Washington Post
1150 15 th Street, NW
Washington, DC

Editors,

I cannot believe that your newspaper or anyone else thinks that the inadvertent failure to pay bar dues because no bill was sent is a mark of a lawyer's character. I have known Tom Griffith in the public sector and in the private sector, and I have never heard a whisper against his integrity or responsibility.

As soon as he found out about his error, Mr. Griffith promptly paid all monies due, although he was no longer performing legal services in D.C. Indeed, his Senate service probably did not require membership in the D.C. bar. I joined the D.C. bar after several terms as a Congressman from Illinois, because I thought I might want to end up practicing in Washington. Even though it was some years before I was nominated to the Court of Appeals for this Circuit, I had difficulty explaining why I wanted to join the D.C. bar. Many if not most government employees do not do so.

There may be some good or political reasons for not confirming Mr. Griffith's nomination. Only 5 months remain before the people get to elect a President who might have a majority of the people supporting him. Lifetime judicial appointments by such a President would have a lot more legitimacy. But to use a clerical commission of such a slight order and try to puff it up into a character flaw does violence to the confirmation process, to treating the canons of ethics seriously, and to common sense.

Abner J. Mikva
Former Chief Judge, U.S. Court of Appeals
for the D.C. Circuit

THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
WASHINGTON DC

June 28, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Ref: Nomination of Thomas B. Griffith to be a Judge on the
United States Court of Appeals for the D.C. Circuit

Dear Mr. Chairman:

I write in the hope that I might shed some useful light on an issue that I understand has arisen in connection with the nomination of Mr. Griffith. The issue concerns whether or not it is common and understood to be appropriate that the general counsel of a business or educational corporation not be admitted to the bar of the state in which he or she regularly advises the corporation.

My background on this question is based on over thirty years work on the subject of lawyer professional responsibility. I am co-author of a law school casebook, *Professional Responsibilty: Problems and Materials*, first published in 1976 and now in its eighth edition. I was one of the three Reporters for the American Law Institute's *Restatement of the Law, Third, The Law Governing Lawyers*, published in 2000. I was also an Associate Reporter for the American Bar Association's Ethics 2000 Commission that produced major changes to the *Model Rules of Professional Conduct* in 2002 and 2003. This letter is not written on behalf of the ABA or ALI, but I mention my prior work to suggest that what I say in this letter is based on considerable prior experience in the field.

Rules against the unauthorized practice of law are fundamentally based on two concerns. First, courts are properly concerned that the lawyers who appear before them be subject to their disciplinary jurisdiction as well as familiar with the relevant substantive and procedural rules. Second, states have a legitimate consumer protection concern that when a layperson answers an advertisement or knocks on a door marked "lawyer" that the person consulted is not an imposter, i.e., that the person has been tested and certified knowledgeable about the kinds of issues a client is likely to raise.

The practical reality for many if not most corporations is that their general counsels never appear in local courts and certainly do not hold themselves out as available to represent local clients. A general counsel is typically a corporate officer, and to the extent he or she gives legal advice, it is typically as to general legal principles, federal or international law, and the like. When a question of local law or a need to appear in a local court arises, the general counsel contacts a local lawyer.

Local bar officials sometimes have been reluctant to embrace this general understanding and practice, largely because it is not popular with local lawyers, but that does not make it any less true or less appropriate. Indeed, it is based on this widespread understanding that the ALI *Restatement*, referenced above, explained the prevailing law and practice as follows in its Section 3, Comment *f*:

> "*f. Multistate practice by inside legal counsel.* States have permitted practice within the jurisdiction by inside legal counsel for a corporation or similar organization, even if the lawyer is not locally admitted and even if the lawyer's work consists entirely of in-stat activities, when all of the lawyer's work is for the employer-client and does not involve appearance in court. Leniency is appropriate because the only concern is with the client-employer, who is presumably in a good position to assess the quality and fitness of the lawyer's work. In the course of such work, the lawyer may deal with outsiders, such as by negotiating with others in settling litigation or directing the activities of lawyers who do enter an appearance for the organization in litigation."

In the same spirit of recognition of the propriety of the practice the *Restatement* described, when the American Bar Association amended its Model Rules of Professional Conduct in 2002, it added Model Rule 5.5(d)(1) that says:

> "(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:
>
> > "(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission."

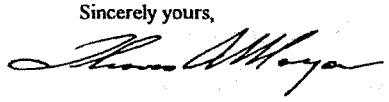
Comment 16 to Model Rule 5.5 explains:

> "Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controll d by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work."

It is my understand that, while Utah has not yet adopted the amended ABA Model Rule, the activities of the nominee, Thomas B. Griffith, as Assistant to the President and General Counsel of Brigham Young University fit well within the principles and guidelines that these statements of law, policy and practice represent.

These independent, authoritative, non-partisan statements of the law are fully consistent with my own experience and make clear the propriety of Mr. Griffith's conduct while at Brigham Young. I respectfully urge your Committee not to let any issue about his not being licensed to practice in Utah distract your Committee from prompt and affirmative consideration of his nomination.

Sincerely yours,



Thomas D. Morgan
Oppenheim Professor of Antitrust
and Trade Regulation Law

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510

Office of Legal Policy
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

MILLER & CHEVALIER
CHARTERED

655 FIFTEENTH STREET, N.W., SUITE 900
WASHINGTON, D.C. 20005-5701
202.626.5800 FAX: 202.626.0858
WWW.MILLERCHEVALIER.COM

HOMER E. MOYER, JR.
202.626.6010
hmoyer@millchev.com

June 4, 2004

Letters to the Editor
The Washington Post
1150 15th Street, N.W.
Washington, D.C. 20071

The Post reported on Friday that Tom Griffith, a recent nominee to the U.S. Court of Appeals in the District of Columbia, disclosed in his nomination questionnaire that in 2001 he paid DC Bar dues that had been due, but not paid, for the three preceding years. Although we lawyers bear ultimate responsibility for payment of our individual Bar dues, it is important to note, as *The Post* did, that the bar dues of law firm partners are commonly paid by their firms and that Mr. Griffith's firm has acknowledged its administrative error in failing to do so in his case. To his credit, Mr. Griffith promptly corrected the lapse as soon as he discovered it.

Far more important is that Tom Griffith is the type of lawyer and individual who would be an outstanding federal judge. At a time when the judicial appointment process has become lamentably politicized - by both political parties - the nomination of an outstanding lawyer of great integrity who commands respect and support from across the political spectrum should be welcomed. The federal judiciary will be enhanced if, consistent with the views of both Democrats and Republicans who know Tom Griffith, *The Post* endorses and Senate promptly confirms this nomination.

Sincerely,

Homer E. Moyer, Jr.

Home:
[redacted]

cc: The Honorable Orrin G. Hatch
The Honorable Patrick J. Leahy

03/08/2005 12:34AM

WASHINGTON BUREAU
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
1156 15TH STREET, N.W. • SUITE 915 • WASHINGTON, D.C. 20005 • Phone (202) 463-2940
Fax (202) 463-2953 • E-Mail: washingtonbureau@naacpnet.org • Web Address: www.naacp.org

March 7, 2005

Senate Judiciary Committee
United States Senate
Washington, D.C. 20510

RE: NAACP REITERATES OPPOSITION TO THOMAS GRIFFITH'S NOMINATION TO THE DC CIRCUIT COURT OF APPEALS

Dear Senators:

On behalf of the National Association for the Advancement of Colored People (NAACP), I would like to express our strong opposition to the nomination of Thomas Griffith to the United States Court of Appeals for the District of Columbia Circuit.

The United States Court of Appeals for the District of Columbia is considered the second most powerful court in the country. The Supreme Court's limited caseload means that the D.C. Circuit often provides the determinative legal review of federal agency action involving labor relations, voting rights, affirmative action, clean air standards, health and safety regulations, consumer privacy and campaign finance.

The NAACP's National Board of Directors on February 20, 2005 voted unanimously to oppose the nomination of Thomas Griffith again due to his fundamental stance against the judicially approved use of proportionality test and other numerical measures, which would have a detrimental effect on our ability to identify and challenge housing discrimination, employment discrimination, discrimination based on disability, gender discrimination, and racial discrimination.

Thomas Griffith served as a member of the Commission on Opportunity in Athletics ("Title IX Commission"), which was created to evaluate whether, and how current standards, governing Title IX's application to athletics, should be revised. Title IX bars discrimination by education institutions that receive federal funding, including discrimination in their athletic programs. During Mr. Griffith's tenure as a member of the Title IX Commission his views raised broad concerns about his approach to civil rights law.

While Mr. Griffith was a member of the Title IX Commission, they made a series of recommendations that would have seriously weakened Title IX. Mr. Griffith proposed to eliminate the "substantial proportionality" test for compliance, which is critical to effectiveness of Title IX in the athletics arena. In making his proposal to

eliminate the "substantial proportionality" test Mr. Griffith argued that the proportionality test is both unconstitutional and inconsistent with the language and purpose of Title IX, declaring that "it is illegal, it is unfair, and it is wrong." But this view flies in the face of the decisions of eight Circuit Courts (every one to consider the issue) that have upheld the test. Mr. Griffith showed complete disregard for these decisions, dismissing them as "wrong." In reality, the courts have properly recognized that the proportionality test is simply a logical way to measure whether, in athletic programs that are segregated by sex, schools are providing female students and male students with equal opportunities to play, and thus to ensure that schools allocate participation opportunities non-discriminatorily – which is at the very heart of Title IX's mandate. Griffith's proposal was rejected by a lopsided vote of 11 to 4 in the Commission. In short, Mr. Griffith's views on how to evaluate discrimination even in this compelling context are unsupportable and outside the mainstream.

Mr. Griffith's opposition to the use of numerical measures in sex-segregated settings, if applied to other important civil laws and remedies, could negate an effective tool in determining whether discrimination is occurring. The NAACP has used numerical measures to both identify and challenge discrimination in housing, employment, etc. For example, the NAACP is currently involved in a housing discrimination action. We used numerical measures to show that there was a disparate impact on African Americans and other racial and ethnic minorities that deprived them of their right of equal access to housing on the basis of race, and/or national origin. If Mr. Griffith's views were promulgated we would have a hard time identifying and later challenging, in this case, housing discrimination. Mr. Griffith's views could deter a host of laws and remedies, including, affirmative action remedies for discrimination in employment, contracting, or statistical evidence to prove that facially neutral employment practices have a disparate and/or adverse impact on African Americans and other racial and ethnic minorities. These civil rights principles would be directly threatened by Griffith's analysis.

Based on his stance against the use of proportionality test and other numerical measures, which would have a detrimental effect on our ability to identify and challenge discrimination, we urge you to vote against the nomination of Thomas Griffith to the U.S. Court of Appeals for the District of Columbia in the Judiciary Committee.

Thank you for your careful consideration of this crucial matter. Should you have any questions or concerns, please contact me, or my Bureau Counsel, Crispian Kirk, at (202) 463-2940.

Sincerely,

Hilary O. Shelton
Director

NCWGE NATIONAL COALITION FOR WOMEN AND GIRLS IN EDUCATION

February 16, 2005

The Honorable Arlen Specter, Chair
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy, Ranking Member
Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, DC 20510

Re: Thomas Griffith's Renomination to the U.S. Court of Appeals for the D.C. Circuit

Dear Chairman Specter and Senator Leahy:

We are writing on behalf of the National Coalition for Women and Girls in Education (NCWGE), a nonprofit coalition of more than 50 organizations dedicated to improving educational opportunities for women and girls, concerning Thomas B. Griffith's renomination to the U.S. Court of Appeals for the District of Columbia Circuit. Based on his radical and deeply damaging views about Title IX of the Education Amendments of 1972, the NCWGE has serious concerns about Mr. Griffith's suitability for a lifetime seat on the federal bench.

The NCWGE first expressed these concerns in a letter to Committee members in the spring of 2004. We write now to explain why Mr. Griffith's attempts to explain his views on Title IX, in a letter to former Chairman Hatch of November 19, 2004, and in written responses to Committee questions on December 3, 2004, do not adequately address our concerns. In fact, Mr. Griffith's responses only underscore the serious problems in his record because they reveal that he continues to believe – contrary to the views of every court to consider the question and of every Administration for more than two decades -- that the Title IX regulatory athletics policies impose quotas and violate Title IX and the Constitution. It is this potential prejudgment of an important legal issue that is likely to come before the D.C. Circuit Court of Appeals, and its implications for Mr. Griffith's positions on other civil rights issues, that lead the NCWGE to express its concerns about his nomination anew. We ask that you carefully evaluate Mr. Griffith's record in its entirety before voting on this nomination.

As you know, as a member of the Secretary of Education's Title IX Athletics Commission, Mr. Griffith joined in supporting numerous recommendations – ultimately rejected by then-Education Secretary Roderick Paige – that would have undermined fundamental principles of equal opportunity. Mr. Griffith also offered a radical proposal of his own: to eliminate the proportionality

prong of the three-part test, a test that has been used for 25 years to evaluate schools' compliance with Title IX's mandate that women and men be provided equal opportunities to participate in sports and that has been upheld against legal challenge by every federal appellate court to have considered it. Despite the unanimity of judicial decisions upholding the test, Mr. Griffith argued strenuously to the Commission that the test imposes quotas, is inconsistent with the language of Title IX, and violates the Equal Protection Clause of the Constitution – asserting that courts that disagreed with him got it "wrong." (Transcript of Commission hearing, January 30, 2003, at 28.) Recognizing the extreme and dangerous nature of Mr. Griffith's proposal, the Commission – which itself was stacked with members opposed to Title IX athletics policies -- rejected Mr. Griffith's proposal by a lopsided margin of 11 to 4.

Neither Mr. Griffith's November 19, 2004 letter to Chairman Hatch nor his responses to questions posed to him by the Committee alleviate the serious concerns raised by his service on the Commission. While Mr. Griffith attempts to explain his opposition to the proportionality test, he continues to describe the test as resulting in quotas -- despite, among other things, the Department of Education's explicit affirmation in July 2003 that the Title IX athletics policies do no such thing. Mr. Griffith's suggestion that some have simply "misused" or "misinterpreted" the test in this way (Response of Thomas B. Griffith to the Written Questions of Senator Edward M. Kennedy, Dec. 3, 2004, at 1, 3) rings hollow in light of his categorical proposal to eliminate the proportionality test in its entirety. And Mr. Griffith's continued statements that the proportionality test does not "accurately capture the imperatives of Title IX" (Letter from Thomas B. Griffith to Chairman Orrin G. Hatch, November 19, 2004, at 2) belie his suggestion that he views the test as permissible but not required (Response of Thomas B. Griffith to the Written Questions of Senator Joseph R. Biden, Jr., Dec. 3, 2004, at 3), and suggest anew that he has prejudged this important legal issue.

Many NCWGE members therefore believe it is imperative that you carefully consider Mr. Griffith's strongly held views on Title IX as you evaluate his record and his suitability for a lifetime seat on this important court. We encourage you to look beyond the lip service of Mr. Griffith's November 19, 2004 letter and his responses to the Committee's questions to the true substance of views revealed by his record.

Thank you for your consideration. If you have any questions, please contact either of us.

Sincerely,

Lisa M. Maatz
Chair, NCWGE
American Association of University Women
202-785-7720

Jocelyn Samuels
Vice-Chair, NCWGE
National Women's Law Center
202-588-5180

Cc: Members of the Judiciary Committee

NCWGE NATIONAL COALITION FOR WOMEN AND GIRLS IN EDUCATION

June 15, 2004

Re: Nomination of Thomas Griffith to D.C. Circuit

Dear Senator:

We are writing on behalf of the National Coalition for Women and Girls in Education (NCWGE), a nonprofit coalition of more than 50 organizations dedicated to improving educational opportunities for women and girls, concerning the nomination of Thomas B. Griffith to the U.S. Court of Appeals for the District of Columbia Circuit. NCWGE members wish to bring to your attention Mr. Griffith's record with respect to Title IX of the Education Amendments of 1972 and ask that you evaluate it carefully as you consider this nomination. It is important to note that while NCWGE and its members typically have not been involved in the judicial nominations process, some of the organizations have taken the serious step of opposing Mr. Griffith's nomination.

Title IX bars sex discrimination in education programs or activities that receive federal funding, including athletics programs. Since Title IX's enactment, women's participation in sports has increased by more than 400% at the college level and more than 800% at the high school level, and this law has opened up not only opportunities to play sports but the chance to receive college scholarships and the significant health, emotional, and academic benefits that flow from sports participation. At the same time, Title IX's goal of equal opportunity has yet to be fully realized. Female athletes continue to be shortchanged, at both the high school and college levels, both in their playing and scholarship opportunities and in the quality of the facilities and programs available to them.

In 2002, Secretary of Education Roderick Paige created the Commission on Opportunity in Athletics to evaluate whether and how current standards governing Title IX's application to athletics should be revised. Mr. Griffith served as a member of this Commission, which made a series of recommendations to Secretary Paige that, if accepted, would have devastated current Title IX athletics policies and reduced the athletic opportunities and scholarship dollars to which women and girls are legally entitled. Secretary Paige ultimately rejected the Commission's recommendations. Mr. Griffith, however, not only joined in making these recommendations, he offered a radical proposal of his own that even the Commission – which was dominated by representatives of large universities that have the most to gain by weakening the law -- rejected by a lopsided vote of 11-4.

Mr. Griffith's proposal was to eliminate one prong of the three-part test that has long been part of the regulatory policies governing how educational institutions may comply with Title IX's requirement that male and female students be offered equal opportunities to participate in

% American Association of University Women 1111 Sixteenth Street, N.W. Washington, D.C. 20036
(202) 785-7793 - FAX (202) 466-7618

sports. Under that prong, a school is in compliance with Title IX participation requirements if it offers athletics opportunities that are in substantial proportion to each gender's representation in the student body at that school. This component – which is one of three wholly independent ways that schools can satisfy Title IX's requirements -- in no way mandates that schools set aside certain numbers of athletics slots for either men *or* women. Instead, this prong of the test simply recognizes the obvious: that schools can comply with Title IX when they do provide their female students with the same athletics opportunities they offer to their male students. To prohibit schools from using the "substantial proportionality" prong of the three-part test, as Mr. Griffith's proposal would have done, would reduce schools' flexibility in complying with Title IX, enshrine unacceptable and unlawful stereotypes about women and their interest in playing sports, and freeze women's opportunities at their current levels. Mr. Griffith has subsequently described his own proposal as "radical." The July 11, 2003 final clarification letter issued at the close of the Commission process by the U.S. Department of Education's Office of Civil Rights confirmed just how far outside the mainstream Mr. Griffith's proposal was, when it stated: "First, with respect to the three-prong test, which has worked well, OCR encourages schools to take advantage of its flexibility, and to consider which of the three prongs best suits their individual situations. ... Each of the three prongs is thus a valid, alternative way for schools to comply with Title IX."

In support of his proposal, Mr. Griffith argued that the proportionality test is unreasonable, inconsistent with the language of Title IX, and a violation of the Equal Protection Clause of the Constitution. In so doing, as documented in the transcripts of the Commission's proceedings, Mr. Griffith dismissed the decisions of *eight Circuit Courts* (every one to consider the issue) upholding the proportionality test and rejecting the very arguments he was making. What the case law shows, but Mr. Griffith refused to accept, is that the proportionality test is simply a logical way to measure whether, in sex-segregated athletics programs, female students and male students are being provided with equal opportunities to play, and thus to ensure that schools allocate participation opportunities non-discriminatorily -- which is at the very heart of Title IX's mandate. See Miami University Wrestling Club v. Miami University, 302 F.3d 608 (6th Cir. 2002); Chalenor v. University of North Dakota, 291 F.2d 1042 (8th Cir. 2002); Pederson v. Louisiana State University, 213 F.3d 858 (5th Cir. 2000); Neal v. Board of Trustees of The California State Universities, 198 F.3d 763 (9th Cir. 1999); Boulahanis v. Board of Regents, 198 F.3d 633 (7th Cir. 1999), cert. denied, 530 U.S. 1284 (2000); Cohen v. Brown Univ., 991 F. 2d 888 (1st Cir. 1993) (Cohen I), and Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996) (Cohen II), cert. denied, 520 U.S. 1186 (1997); Horner v. Kentucky High School Athletic Ass'n, 43 F.3d 265 (6th Cir. 1994); Kelley v. Board of Trustees, University of Illinois, 35 F.3d 265, 270 (7th Cir. 1994), cert. denied, 513 U.S. 1128 (1995); Roberts v. Colorado State Board of Agriculture, 998 F.2d 824 (10th Cir.), cert. denied, 510 U.S. 1004 (1993); Williams v. School District of Bethlehem, 998 F.2d 168 (3d Cir. 1993).

This is an important issue that will continue to come before the courts, including the court to which Mr. Griffith has been nominated. Indeed, just last week the D.C. Circuit affirmed the District Court's dismissal of a challenge to Title IX athletics policies (affirming the district court's dismissal of the case on standing grounds), and en banc review may be sought in that

case. NCWGE members therefore believe it is imperative that you carefully consider Mr. Griffith's strongly held views on Title IX as you evaluate his record and his suitability for a lifetime seat on this important court.

Thank you for your consideration. If you have any questions, please contact either of us.

Sincerely,

Lisa M. Maatz
Chair, NCWGE
American Association of University Women
202-785-7720

Jocelyn Samuels
Vice-Chair, NCWGE
National Women's Law Center
202-588-5180

Cc: Members of the Judiciary Committee

NCWGE NATIONAL COALITION FOR WOMEN AND GIRLS IN EDUCATION

Member Organizations*

Academy for Educational Development
American Association for the Advancement of Science
American Association of School Administrators
American Association of University Women
American Council on Education
American Educational Research Association
American Federation of Teachers
American Psychological Association
Association for Gender Equity Leadership in Education
Association for Women in Science
Association of American Colleges and Universities
Association of Junior Leagues International, Inc.
Association of Teacher Educators
Business & Professional Women USA
Center for Advancement of Public Policy
Center for Women's Policy Studies
Council of Chief State School Officers
Resource Center on Educational Equity
Dads and Daughters
Equal Rights Advocates
Federation of Organizations for Professional Women
Feminist Majority Foundation
Gallaudet University, Women's Basketball Coach
Girl Scouts of the USA
Girls Count
Girls Incorporated
Girlstart
Leadership Conference on Civil Rights
Ms. Foundation for Women
Myra Sadker Advocates for Gender Equity
Legal Momentum, formerly NOW Legal Defense and Education Fund
National Alliance for Partnerships in Equity
National Association for Girls & Women in Sport
National Association of Collegiate Women Athletic Administrators
National Center for Lesbian Rights
National Council of Administrative Women in Education
National Council of Negro Women
National Education Association
National Organization for Women
National PTA
National Partnership for Women & Families
National Women's History Project
National Women's Law Center
National Women's Political Caucus
Partners of the Americas
U. S. Student Association
Wider Opportunities for Women
Women Work!
Women's Edge
Women's Research and Education Institute
Women's Sports Foundation
Young Women's Christian Association

*(Attached for informational purposes only. Some member organizations do not take positions on judicial nominations.)

% American Association of University Women 1111 Sixteenth Street, N.W. Washington, D.C. 20036
(202) 785-7793 - FAX (202) 466-7618

NCJW

National Council of Jewish Women

Marsha Atkind
President

Sandra Lief Garrett
Executive Director

New York Office
53 West 23rd Street, 6th Floor
New York, NY 10010-4204
Tel 212 645 4048
Fax 212 645 7466
Email action@ncjw.org

Washington Office
1707 L Street, NW, Suite 950
Washington, DC 20036-4206
Tel 202 296 2588
Fax 202 331 7792
Email action@ncjwdc.org

Israel Office
School of Education, Room 267
Hebrew University, Mt. Scopus
Jerusalem, Israel 91905
Tel 972 2 5882 208
Fax 972 2 5813 264
Email msncjwi@mscc.huji.ac.il

Web www.ncjw.org

October 5, 2004

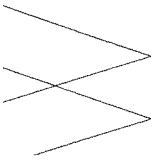
The Honorable Orrin Hatch
Chairman, Senate Judiciary Committee
104 Hart Senate Office Building
Washington, DC 20510

Dear Senator Hatch:

On behalf of the 90,000 members and supporter of the National Council of Jewish Women (NCJW), I am writing to oppose the nomination of Thomas B. Griffith to the US Court of Appeals for the DC Circuit.

NCJW believes that nominees to lifetime seats on the federal courts should demonstrate a commitment to fundamental constitutional rights. Although Mr. Griffith's legal career has consisted largely of jobs where his advice and opinions were rendered behind the scenes, his very disturbing views on Title IX of the Education Amendments of 1972 became evident when he served on the Commission on Opportunity in Athletics. The commission's work resulted in recommendations that would have eviscerated Title IX. Fortunately, after public outcry, President Bush rejected the commission's report.

Griffith supported the recommendations, but he went further by proposing the elimination of one of the tests used to evaluate compliance with Title IX – whether athletic programs offer opportunities to men and women in substantial proportion to their representation in the student body. Griffith called this proportionality standard "illegal, unfair and wrong" and "morally wrong," claiming that it violated the Constitution's Equal Protection Clause. Griffith's views were so extreme that ultimately the commission voted to exclude his proposal from the final report. While on the commission, Griffith dismissed the fact that eight US circuit courts have upheld the standard, declaring, "the courts got it wrong," and that "I don't believe in the infallibility of the judiciary." He later said his Title IX proposal "went down in flames" because it was "radical."



Griffith also opposed "numeric measures" even to describe the existing allocation of opportunities. This hostility has ominous implications for key provisions of civil rights case law. Griffith's approach would endanger the use of numeric measures in affirmative action used as remedy to correct proven discrimination and as evidence of the disparate impact of a particular policy or practice on minorities and women.

We urge you to oppose the confirmation of Thomas B. Griffith.

Sincerely,

Marsha Atkind
NCJW President

Cc: Members of the US Senate

NELA
National Employment Lawyers Association

Founder
Paul H. Tobias

President
Janet E. Hill

Executive Director
Terisa E. Chaw

NELA STRONGLY OPPOSES THE NOMINATION OF THOMAS B. GRIFFITH TO THE U.S. COURT OF APPEALS FOR THE D.C CIRCUIT

The National Employment Lawyers Association strongly opposes the nomination of Thomas B. Griffith to the U.S. Court of Appeals for the D.C. Circuit. Mr. Griffith's vocal opposition to the use of any numeric formulas to determine an educational institution's compliance with Title IX of the Education Amendments of 1972 and the reasons he has given for that opposition raise serious questions about his willingness to follow Supreme Court and circuit precedent on the use of statistical information to determine compliance with the federal anti-discrimination laws.

In 1979, the Department of Health, Education and Welfare ("HEW") issued a Policy Interpretation on Title IX and intercollegiate athletics, in order to provide further guidance (beyond that contained in its Title IX athletics regulations,[1]) on what constitutes compliance with the law.[2] This Policy Interpretation provides that one of the ways to assess compliance is "[w]hether intercollegiate level participation opportunities for male and female athletes are provided in numbers substantially proportionate to their respective enrollments."[3]

As a member of the Secretary's Commission on Opportunity in Athletics, Mr. Griffith moved to recommend that the Office of Civil Rights ("OCR") of the Department of Education not use numeric formulas to determine whether an institution is in compliance with Title IX.[4] He claimed that numeric formulas "violate the express terms of the statute, ... violate the equal protection clause of the Constitution, ... are morally wrong and they are logically flawed."[5]

All nine circuit courts that have considered this issue have granted substantial deference to this Policy Interpretation and have held that it is valid.[6] In making his recommendation, Mr. Griffith was careful to distinguish between whether an administrative regulation is a reasonable interpretation of a statute and whether that interpretation is required.[7] Nevertheless, he disregarded the plain language of the law, the Policy Interpretation and the cases that have decided these issues in arguing that the OCR should no longer follow the substantial proportionality standard.

Mr. Griffith contended[8] that the substantial proportionality standard violates the "letter of the law" of Title IX. In particular, he stated that the standard "shall not be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number

---

[1] 34 C.F.R. § 106.41.
[2] *See* 41 Fed. Reg. 71,413, 71,416 (Dec. 11, 1979).
[3] *Id.* at 71,418.
[4] Transcript of January 30, 2003 hearing of the Commission on Opportunity in Athletics ("Transcript"), p. 60.
[5] *Id.*, pp. 26-27.
[6] *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993) ("*Cohen I*"); *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275 (2d Cir. 2004); *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168 (3d Cir. 1993), *cert. denied*, 510 U.S. 1043 (1994); *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir. 1996), *cert. denied*, 519 U.S. 861 (1996); *Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265 (6th Cir. 1994); *Kelley v. Bd. of Trustees, Univ. of Ill.*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 513 U.S. 1128 (1995); *Chalenor v. Univ. of North Dakota*, 291 F.3d 1042 (8th Cir. 2002); *Neal v. Bd. of Trustees of Calif. State Univs.*, 198 F.3d 763 (9th Cir. 1999); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993), *cert. denied*, 510 U.S. 1004 (1993).
[7] Transcript, p. 106.
[8] *Id.*, p. 26.

or percentage of persons of that sex in any community, State, section, or other area ...."[9] Mr. Griffith's position ignores the fact that this standard is not a requirement, but instead is a safe harbor for recipients under Title IX.[10] In other words, it is simply one of three ways a school can demonstrate compliance and defend against allegations of Title IX violations.[11] The other two are not based on numeric formulas. Certainly, as general counsel of Brigham Young University, Mr. Griffith was well aware that the Policy Interpretation does not require the use of numeric formulas.

Three circuits have rejected Mr. Griffith's claim that the substantial proportionality test violates the Equal Protection Clause of the Fifth Amendment.[12] Those courts have held that the Policy Interpretation was constitutional because it furthered the "clearly important" objectives of "avoiding the use of federal resources to support discriminatory practices"[13] and of prohibiting "educational institutions from discriminating on the basis of sex."[14] Mr. Griffith would have substituted a test based on whether "someone has been discriminated against because of their gender" – whether "a decision [has] been made arbitrarily that someone is not allowed an opportunity because of their gender."[15] He also supported the use of surveys to determine the interest of male and female students in intercollegiate athletics.[16]

Adopting Mr. Griffith's recommendations would return educational institutions to the situation that led to the adoption of the Policy Interpretation, in which HEW received nearly 100 complaints against more than 50 institutions of higher education in the first six years after Congress enacted Title IX.[17] Investigations of Title IX complaints would become more complex, time-consuming and expensive. Recipients' uncertainty about their compliance with the law would increase dramatically. This would eviscerate Title IX.[18]

Mr. Griffith's ideological opposition to the use of any numeric factors to assess compliance with Title IX strongly suggests that he would oppose the use of statistical data to determine employers' compliance with the requirements of Title VII of the Civil Rights Act of 1964 or of the Age Discrimination in Employment Act of 1967. The Supreme Court has repeatedly held that statistical evidence can be used to prove employment discrimination.[19] By definition, proof that an employment practice had a disparate impact on a group protected by Title VII or the ADEA requires use of numeric formulas.[20] And statistical evidence is crucial to determine whether there is a pattern and practice of discrimination.[21]

Mr. Griffith's rigid view that the use of numeric formulas is constitutionally impermissible raises serious questions about his willingness to follow Supreme Court precedent holding that public agencies

---

[9] 20 U.S.C. § 1681(b).
[10] *See, e.g., Roberts*, 998 F.2d at 829; *Chalenor*, 291 F.3d at 1047 ("although Title IX does not require proportionality, the statute does not forbid it either").
[11] *See Neal*, 198 F.3d at 767.
[12] *Cohen I*, 991 F.2d at 899-901; *Cohen v. Brown Univ.*, 101 F.3d 101 F.3d 155, 181-84 (1st Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997) ("*Cohen II*"); *Kelley*, 35 F.3d at 272-73; *Neal*, 198 F.3d at 772.
[13] *Cohen II*, 101 F.3d at 884.
[14] *Kelley*, 35 F.3d at 272.
[15] Transcript. pp. 108-09.
[16] *Id.*, pp. 107-08.
[17] 44 Fed. Reg. at 71,413.
[18] The First Circuit rejected such an "interests" test, since such a "survey ... would begin under circumstances where men's athletic teams have a considerable head start" and would "blunt the exhortation that schools should take into account the nationally increasing levels of women's interests and abilities and avoid disadvantaging members of an underrepresented sex." *Cohen I*, 991 F.2d at 900 (internal quotation marks omitted). *See also Neal*, 198 F.3d at 768-69.
[19] *See, e.g., Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 650-51 (1989); *Dothard v. Rawlinson*, 433 U.S. 321, 329-30 (1977); *Internat'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339-40 (1977).
[20] *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 432-34 (1971).
[21] *See, e.g., Segar v. Smith*, 738 F.2d 1249, 1278-79 (D.C. Cir. 1984).

sometimes can make race or sex-conscious decisions.[22] It also raises questions about his willingness to recognize and apply settled precedent affirming the use of race and sex-conscious affirmative action under Title VII to remedy the impact of prior discrimination.[23]

The disregard Mr. Griffith has shown for the clear language of Title IX, the policies underlying that statute and the decisions that have upheld the constitutionality of the Policy Interpretation is matched by his disregard for his own obligation to practice law only with a valid license. It was not until November 2001 (more than one year after he became general counsel for Brigham Young University) that he learned that his D.C. bar membership had lapsed in 1998.[24] As a result, he was ineligible for admission to the Utah State Bar through reciprocity. Although he applied to sit for the Utah bar examination, he did not take that test and has continued to serve as general counsel without a license to practice law.[25]

The D.C. Circuit is generally regarded as the second most influential court in the United States. NELA urges the Senate not to confirm Mr. Griffith for a lifetime appointment to such an important position.

---

[22] *See, e.g., Grutter v. Bollinger*, __ U.S. ___, 123 S. Ct. 2325, 2337-41, 156 L. Ed. 2d 304 (2003) (University of Michigan Law School admissions program); *United States v. Virginia*, 518 U.S. 515, 532-34 (1996) (males-only admission policy of V.M.I.)

[23] *See, e.g., United Steelworkers v. Weber*, 443, U.S. 193 (1979); *Johnson v. Transp. Agency of Santa Clara County*, 480 U.S. 616 (1987).

[24] *Judicial Nominee Practiced Law Without License in Utah*, WASHINGTON POST, June 21, 2004, p. A1.

[25] *Id.*

National Organization for Women

Patrick J. Leahy
433 Russell Senate Office Building
Washington, DC 20510
(202) 224-4242

November 16, 2004

Dear Senator Leahy,

The National Organization for Women strongly opposes the confirmation of Thomas Griffith to the U.S. Court of Appeals for the District of Columbia Circuit. His record demonstrates a startling hostility to women's rights, in particular to Title IX of the Education Amendments of 1972 – the landmark federal law that prohibits sex discrimination in every sphere of education, and that has opened up tremendous opportunities for girls and women to play sports, obtain college scholarships, and receive the significant health, emotional and academic benefits that flow from athletic participation.

As a member of the President's Commission on Opportunity in Athletics, Griffith attempted to weaken Title IX statute by suggesting the elimination of one of its key components, the "substantial proportionality" test for compliance. As one of the three alternative ways to comply with Title IX, this test allows educational institutions to comply by offering athletic opportunities to male and female students that are in substantial proportion to each gender's representation in the student body of the school. Eliminating the proportionality test would have severely undercut, and might have been fatal to Title IX's effectiveness. Fortunately, the Commission rejected Mr. Griffith's proposal, by a lopsided vote of 11 to 4.

The nominee's analysis of Title IX regulations raises questions about his approach to a wide range of civil rights legal protections. His opposition to "numeric measures" implies that he would oppose affirmative action efforts countering discrimination in employment and contracting and that he would likely oppose statistical information that would identify unlawful, discriminatory practices affecting women and people of color.

Furthermore, it would be irresponsible for the Judiciary Committee to confirm a nominee who let his Washington, D.C. law license lapse and has been practicing law in Utah for the last four years without a license. The National Organization for Women believes strongly that aspirants to lifetime judicial seats should comply with all requirements of their legal profession, as well as be champions of civil rights and equal protection of all citizens.

Sincerely,

Olga Vives
Vice President - Action

733 Fifteenth Street, NW • Second Floor • Washington DC 20005 • http://www.now.org
phone: 202-628-8669 • fax: 202-785-8576 • email: now@now.org

National Partnership
for Women & Families

March 7, 2005

The Honorable Arlen Specter, Chair
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Patrick Leahy, Ranking Member
Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, DC 20510

Re: Nomination of Thomas Griffith to the U.S. Court of Appeals for the District of Columbia

Dear Senators:

The National Partnership for Women & Families (National Partnership) is writing in strong opposition to the nomination of Thomas Griffith to the U.S. Court of Appeals for the District of Columbia. The National Partnership is a nonprofit, nonpartisan organization that uses public education and advocacy to promote fairness in the workplace, quality health care, and policies that help women and men meet the dual demands of work and family. We have a long history of advocacy in support of a fair and balanced judiciary that will administer the law consistent with fundamental principles of equality and justice for all.

The National Partnership is deeply troubled by Mr. Griffith's record. He has been openly hostile to important enforcement components of Title IX of the Education Amendments of 1972,[1] the groundbreaking law that has been instrumental in expanding opportunities for women in education. His disregard for legal precedent related to Title IX, among other things, would deny opportunities for girls and women to play sports, to obtain educational scholarships, and to benefit from athletic programs that are at the heart of Title IX's mandate. Furthermore, his efforts to curtail the enforcement mechanisms used to ensure compliance with Title IX raise serious questions about whether he is an appropriate candidate for lifetime appointment to what is often considered the nation's second most powerful court. In addition, we are deeply concerned about Mr. Griffith's repeated violations of professional law licensing rules, and his misrepresentations under oath about the nature of these violations. We believe that these lapses raise serious questions about his respect for the rule of law. We strongly urge the Senate Judiciary Committee to reject his nomination.

I. *Mr. Griffith's Title IX Record Demonstrates a Disregard for Legal Precedent.*

Mr. Griffith served as a member of the Opportunity in Athletics Commission (Commission), a 15-member advisory body charged with examining Title IX and "ways to strengthen enforcement, expand

[1] 86 STAT. 373 (1972). Title IX bars sex discrimination in education programs or activities that receive federal funding, including interscholastic athletic programs.

opportunities and ensure fairness for all college and interscholastic athletes."[2] Although inequality in scholastic athletics still exists,[3] Title IX has been an effective tool in ensuring gender equity in many educational settings. Since Title IX was enacted in 1972, women in college athletics have increased from 30,000 to 150,000, and girls in high school athletics have grown from 294,000 to 3 million.[4] These accomplishments are due, in part, to the use of a flexible three-prong test to achieve compliance with Title IX. This test requires schools to either: 1) provide athletic opportunities to male and female students in proportion to their overall enrollment at the institution by demonstrating that athletic opportunities for women and men are "substantially proportionate" to school enrollment; 2) demonstrate a history of continually expanding athletic opportunities for the underrepresented sex; or 3) demonstrate that the available opportunities meet the interests and abilities of the underrepresented sex.[5]

As a member of the Commission, Mr. Griffith presented the most extreme and controversial proposal when he suggested completely eliminating the first prong of the three-prong test. His proposal would severely limit the scope of Title IX, a law that has been instrumental in opening up tremendous new opportunities for girls and women in athletics. Even though the current regulations provide schools with the flexibility to choose which prong to apply, Title IX's first prong has been described by many as "the only safe harbor" because its proportionality component gives schools concrete standards to measure progress and compliance with the law.[6] Under the first prong, a school can comply with Title IX if it offers programs or opportunities that are "substantially proportionate" to each gender's representation in that school's student body.[7] Mr. Griffith argued, however, that the proportionality prong of the test is unreasonable, inconsistent with Title IX, and a constitutional violation—even though eight Circuit Courts upheld the test as a valid way to comply with Title IX.[8] His proposal was solidly defeated in an 11-4 vote by the Commission.

Mr. Griffith's insistence on pushing for the elimination of Title IX's first prong clearly demonstrates his unwillingness to follow legal precedent. After being told that eight appellate courts had upheld the Title IX test consistent with the Department of Education's policy interpretations, Mr. Griffith continued to urge eliminating the first prong, stating matter-of-factly that "the courts got it wrong."[9] If his position had been adopted, it would have seriously reduced schools' flexibility to ensure equal opportunity in

---

[2] Press Release, U.S. Department of Education, "Commission on Opportunity in Athletics Co-Chairs Issue Statement About Title IX Commission," (Jan. 29, 2003), *at* http://www.ed.gov/news/pressreleases/2003/01/01292003.html.

[3] For example, women outnumbered men 7.4 million to 5.8 million in undergraduate enrollment in the Fall of 2000, but account for only 42% of college athletes. Rafael Lorente, *Keep Equity Law For Women's Sports Mostly Intact, Panel Urges*, Sun-Sentinel (Fort Lauderdale, FL), Jan. 31, 2003 at 1A.

[4] *Id.*

[5] A Policy Interpretation: Title IX and Intercollegiate Athletics, 40 Fed. Reg. 239 (1979).

[6] Matt Trowbridge,, *Title IX Stands Strong*, ROCKFORD REGISTER STAR, Jan. 31, 2003. Letter from Norma Cantu, Assistant Secretary for Civil Rights, U.S. Department of Education, *Transmittal Letter: Clarification of Intercollegiate Athletics Policy Guidelines: The Three Part Test* (Jan. 16, 1996) *at* http://www.ed.gov/about/offices/list/ocr/docs/clarific.html.

[7] *Supra*, Note 5.

[8] *See Miami University Wrestling Club v. Miami University*, 302 F.3d 608 (6th Cir. 2002); *Chalenor v. University of North Dakota*, 291 F. 2d 1042 (8th Cir. 2002); *Pederson v. Louisiana State University*, 213 F.3d 858 (5th Cir. 2000); *Neal v. Board of Trustees of The California State Universities*, 198 F.3d 763 (9th Cir. 1999); *Boulhanis v. Board of Regents*, 198 F.3d 633 (7th Cir. 1999), cert. denied, 530 U.S. 1284 (2000); *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993) (Cohen I), and Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996) (Cohen II) cert. denied, 520 U.S. 1186 (1997); *Horner v. Kentucky High School Athletic Ass'n*, 43 F.3d 265 (6th Cir. 1994); *Kelley v. Board of Trustees, University of Illinois*, 35 F.3d 265, 270 (7th Cir. 1994), cert. denied, 510 U.S. 1004 (1993); *Williams v. School District of Bethlehem*, 998 F.2d 168 (3d Cir. 1993).

[9] Transcript of January 30, 2003 Town Hall Meeting of the Commission on Opportunity in Athletics.

educational settings, and disturbed regulatory and judicial policies that have long-governed Title IX implementation.

Given Mr. Griffith's highly critical and hostile opinions of Title IX, his recent attempts to explain away his views in response to written questions from several Senators and in a November 19, 2004 letter to then-Chairman Hatch, do nothing to resolve our concerns. Despite having previously called the proportionality test "illegal," and criticizing the courts in holding to the contrary, Mr. Griffith said in his written answers that he opposed the proportionality test merely because some have "misused" or "misinterpreted" the test to create quotas.[10] Mr. Griffith's current explanations are belied by his proposal to eliminate the proportionality test in its entirety, and do not acknowledge, much less explain, his prior categorical rejection of the legality of the test.

II. ***Mr. Griffith's Analysis of the Proportionality Requirement Has Negative Implications for Civil Rights and Anti-Discrimination Laws.***

Mr. Griffith's criticism of Title IX's proportionality prong and his hostility towards measurable, quantifiable standards to evaluate schools' compliance with the law is both troubling and illuminating. Numerical measures are critical in the Title IX context because they measure whether school athletic programs are providing all students – both women and men – with equal opportunities. Numerical measures are a proactive tool that can be used to determine whether discrimination is occurring and allow enforcement agencies to gauge their progress and success in enforcing anti-discrimination laws. Mr. Griffith, however, stated that he was "unalterably opposed to any numeric formulas" because they are "morally wrong" and "logically flawed," and that "any remedy that relies on numeric formulas" is "illegal," "unfair," and "wrong."[11] His hard-line views reveal a troubling opposition to quantifiable or concrete goals that are critical to measuring the effectiveness of efforts to remedy discrimination. His analysis, if applied more broadly, would undermine meaningful enforcement of many laws and regulations important to the advancement of civil and women's rights. Our federal agencies and courts are often charged with identifying and implementing concrete goals to ensure equal opportunity, and developing anti-discrimination policies to advance these goals. Measurable standards also assist federal agencies with their vigorous enforcement of civil rights laws by providing a tool for evaluating whether discrimination has occurred. If adopted, Mr. Griffith's views would undermine enforcement of critical anti-discrimination laws that have increased opportunities for minorities and women in educational and other settings.

III. ***Mr. Griffith's Failure to Maintain a Valid Law License Raises Questions About his Commitment to Follow the Law.***

Records produced in connection with Mr. Griffith's nomination reveal that he has practiced law in two different jurisdictions-the District of Columbia and Utah-without a valid law license over a period of several years. Documents made public at Mr. Griffith's November 2004 hearing before the Committee also raise serious concerns about whether he gave accurate information while under oath to the Utah Bar

---

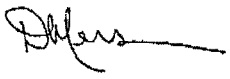
[10] *See, e.g.*, Response of Thomas B. Griffith to the Written Questions of Senator Edward M. Kennedy, Dec. 3, 2004, at 1, 3.

[11] *See* Transcript of January 30, 2003 Town Hall Meeting of the Commission on Opportunity in Athletics. Although Mr. Griffith claimed in his written responses to Senators' questions that his views on Title IX are not "a criticism of the use of statistical evidence in civil rights disputes," this claim simply cannot be squared with his general criticisms while a Commission member about the appropriateness of numerical measures. *Compare* Response of Thomas B. Griffith to the Written Questions of Senator Edward M. Kennedy, Dec. 3, 2004, at 3, *with* Transcript of Commission hearing, Jan. 30, 2003, at 107.

about these lapses in his Bar membership.[12] His failure to comply with the professional licensing rules in two different jurisdictions reflects a lack of attention, or indifference, to legal rules that could undermine his integrity if elevated to the appeals court.

For these reasons, we urge you to reject Thomas Griffith's nomination for a lifetime seat on the U.S. Court of Appeals for the District of Columbia Circuit. Thank you for your consideration.

Sincerely,



Debra L. Ness
President

Cc: Senate Judiciary Committee

[12] Specifically, in a sworn November 2003 application to take the Utah Bar examination (an exam he ultimately never took), Mr. Griffith reportedly stated that he had never been suspended as an attorney, despite the fact that he had twice been suspended by the District of Columbia Bar for nonpayment of dues. In the same application, Mr. Griffith stated that when he had acted as an attorney in his position as Brigham Young University's General Counsel, he had done so as a member of the Bar of the District of Columbia-despite the fact that he had been suspended from the District of Columbia Bar for over a year while he was working at BYU. *See* Carol D. Leonnig, *Court Nominee Gave False Data, Text Shows*, Washington Post, Nov. 17, 2004, at A25.

National Partnership
for Women & Families

June 30, 2004

The Honorable Orrin Hatch, Chair
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Patrick Leahy, Ranking Member
Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, DC 20510

Re: Nomination of Thomas Griffith to the U.S. Court of Appeals for the District of Columbia

Dear Senators:

The National Partnership for Women & Families (National Partnership) is writing in strong opposition to the nomination of Thomas Griffith to the U.S. Court of Appeals for the District of Columbia. The National Partnership is a nonprofit, nonpartisan organization that uses public education and advocacy to promote fairness in the workplace, quality health care, and policies that help women and men meet the dual demands of work and family. We have a long history of advocacy in support of a fair and balanced judiciary that will administer the law consistent with fundamental principles of equality and justice for all. We are deeply troubled by Mr. Griffith's open hostility towards important enforcement components of Title IX of the Education Amendments of 1972,[1] the groundbreaking law that has been instrumental in expanding opportunities for women in education. His disregard for legal precedent related to Title IX, among other things, would deny opportunities for girls and women to play sports, to obtain educational scholarships, and to benefit from athletic programs that are at the heart of Title IX's mandate. Furthermore, his efforts to curtail the enforcement mechanisms used to ensure compliance with Title IX raise serious questions about whether he is an appropriate candidate for lifetime appointment to what is often considered the nation's second most powerful court. We strongly urge the Senate Judiciary Committee to reject his nomination.

I. *Mr. Griffith's Title IX Record Demonstrates a Disregard for Legal Precedent.*

Mr. Griffith served as a member of the Opportunity in Athletics Commission (Commission), a 15-member advisory body charged with examining Title IX and "ways to strengthen enforcement, expand opportunities and ensure fairness for all college and interscholastic athletes."[2] Although inequality in

[1] 86 STAT. 373 (1972). Title IX bars sex discrimination in education programs or activities that receive federal funding, including interscholastic athletic programs.
[2] Press Release, U.S. Department of Education, "Commission on Opportunity in Athletics Co-Chairs Issue Statement About Title IX Commission," (Jan. 29, 2003), *at* http://www.ed.gov/news/pressreleases/2003/01/01292003.html.

scholastic athletics still exists,[3] Title IX has been an effective tool in ensuring gender equity in many educational settings. Since Title IX was enacted in 1972, women in college athletics have increased from 30,000 to 150,000, and girls in high school athletics have grown from 294,000 to 3 million.[4] These accomplishments are due, in part, to the use of a flexible three-prong test to achieve compliance with Title IX. This test requires schools to either: 1) provide athletic opportunities to male and female students in proportion to their overall enrollment at the institution by demonstrating that athletic opportunities for women and men are "substantially proportionate" to school enrollment; 2) demonstrate a history of continually expanding athletic opportunities for the underrepresented sex; or 3) demonstrate that the available opportunities meet the interests and abilities of the underrepresented sex.[5]

As a member of the Commission, Mr. Griffith presented the most extreme and controversial proposal when he suggested completely eliminating the first prong of the three-prong test. His proposal would severely limit the scope of Title IX, a law that has been instrumental in opening up tremendous new opportunities for girls and women in athletics. Even though the current regulations provide schools with the flexibility to choose which prong to apply, Title IX's first prong has been described by many as "the only safe harbor" because its proportionality component gives schools concrete standards to measure progress and compliance with the law.[6] Under the first prong, a school can comply with Title IX if it offers programs or opportunities that are "substantially proportionate" to each gender's representation in that school's student body.[7] Mr. Griffith argued, however, that the proportionality prong of the test is unreasonable, inconsistent with Title IX, and a constitutional violation—even though eight Circuit Courts upheld the test as a valid way to comply with Title IX.[8] His proposal was solidly defeated in an 11-4 vote by the Commission.

Mr. Griffith's insistence on pushing for the elimination of Title IX's first prong clearly demonstrates his unwillingness to follow legal precedent. After being told that eight Circuit Courts had upheld the Title IX test consistent with the Department of Education's policy interpretations, Mr. Griffith continued to urge eliminating the first prong, stating matter-of-factly that "the courts got it wrong."[9] If his position had been adopted, it would have seriously reduced schools' flexibility to ensure equal opportunity in educational settings, and disturbed regulatory and judicial policies that have long-governed Title IX implementation. His proposal, thus, raises serious concerns about his ability or inclination to apply the law in a fair and even-handed manner.

---

[3] For example, women outnumbered men 7.4 million to 5.8 million in undergraduate enrollment in the Fall of 2000, but account for only 42% of college athletes. Rafael Lorente, *Keep Equity Law For Women's Sports Mostly Intact, Panel Urges*, Sun-Sentinel (Fort Lauderdale, FL), Jan. 31, 2003 at 1A.

[4] *Supra*, Note 3 at 1A.

[5] A Policy Interpretation: Title IX and Intercollegiate Athletics, 40 Fed. Reg. 239 (1979).

[6] Matt Trowbridge,, *Title IX Stands Strong*, ROCKFORD REGISTER STAR, Jan. 31, 2003. Letter from Norma Cantu, Assistant Secretary for Civil Rights, U.S. Department of Education, *Transmittal Letter: Clarification of Intercollegiate Athletics Policy Guidelines: The Three Part Test* (Jan. 16, 1996) *at* http://www.ed.gov/about/offices/list/ocr/docs/clarific.html.

[7] *Supra*, Note 5.

[8] *See Miami University Wrestling Club v. Miami University*, 302 F.3d 608 (6th Cir. 2002); *Chalenor v. University of North Dakota*, 291 F. 2d 1042 (8th Cir. 2002); *Pederson v. Louisiana State University*, 213 F.3d 858 (5th Cir. 2000); *Neal v. Board of Trustees of The California State Universities*, 198 F.3d 763 (9th Cir. 1999); *Boulhanis v. Board of Regents*, 198 F.3d 633 (7th Cir. 1999), cert. denied, 530 U.S. 1284 (2000); *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993) (Cohen I), and Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996) (Cohen II) cert. denied, 520 U.S. 1186 (1997); *Horner v. Kentucky High School Athletic Ass'n*, 43 F.3d 265 (6th Cir. 1994); *Kelley v. Board of Trustees, University of Illinois*, 35 F.3d 265, 270 (7th Cir. 1994), cert. denied, 510 U.S. 1004 (1993); *Williams v. School District of Bethlehem*, 998 F.2d 168 (3d Cir. 1993).

[9] Transcript of January 30, 2003 Town Hall Meeting of the Commission on Opportunity in Athletics.

II. ***Mr. Griffith's Analysis of the Proportionality Requirement Has Negative Implications for Civil Rights and Anti-Discrimination Laws.***

Mr. Griffith's criticism of Title IX's proportionality prong and his hostility towards measurable, quantifiable standards to evaluate schools' compliance with the law is both troubling and illuminating. Numerical measures are critical in the Title IX context because they measure whether school athletic programs are providing all students – both women and men – with equal opportunities. Numerical measures are a proactive tool that can be used to determine whether discrimination is occurring and allow enforcement agencies to gauge their progress and success in enforcing anti-discrimination laws. Mr. Griffith, however, stated that he was "unalterably opposed to any numeric formulas" because they are "morally wrong" and "logically flawed," and that "any remedy that relies on numeric formulas" is "illegal," "unfair," and "wrong."[10] His hard-line views reveal a troubling opposition to quantifiable or concrete goals that are critical to measuring the effectiveness of efforts to remedy discrimination. His analysis, if applied more broadly, would undermine meaningful enforcement of many laws and regulations important to the advancement of civil and women's rights. Our federal agencies and courts are often charged with identifying and implementing concrete goals to ensure equal opportunity, and developing anti-discrimination policies to advance these goals. Measurable standards also assist federal agencies with their vigorous enforcement of civil rights laws by providing a tool for evaluating whether discrimination has occurred. Mr. Griffith's views would undermine enforcement of critical anti-discrimination laws that have increased opportunities for minorities and women in educational and other settings.

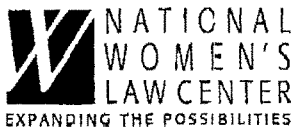
For these reasons, we urge you to reject Thomas Griffith's nomination for a lifetime seat on the U.S. Court of Appeals for the District of Columbia Circuit. Thank you for your consideration.

Sincerely,

Judith L. Lichtman
President

Debra Ness
President-Elect

[10] *Id.*



February 16, 2005 VIA FACSIMILE

The Honorable Arlen Specter, Chair
Senate Judiciary Committee
711 Hart Building
Washington, D.C. 20510

The Honorable Patrick J. Leahy, Ranking Member
Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, D.C. 20510

Re: *Opposition to Griffith renomination to D.C. Circuit*

Dear Senators Specter and Leahy:

We understand that the Judiciary Committee may soon take up the renomination of Thomas Griffith to the U.S. Court of Appeals for the District of Columbia Circuit. We write on behalf of the National Women's Law Center to urge you to oppose this nomination, and to supplement the grounds of the Center's previous opposition—articulated in our letter to you in June 2004—with the additional concerns of the Center based on Mr. Griffith's troublesome answers to written questions following his November 16 hearing.

We wrote to you in June 2004 to explain that we oppose Mr. Griffith's nomination because of his record of hostility to a key component of Title IX of the Education Amendments of 1972 – the landmark federal law that prohibits sex discrimination in every sphere of education. The Center also joined a letter sent by numerous women's rights and civil rights organizations in December 2004 expressing opposition to Mr. Griffith's nomination and responding to a letter Mr. Griffith wrote to Chairman Hatch about his views on Title IX. We write now to set forth why Mr. Griffith's attempts to explain his views on Title IX in his responses to written questions in fact only served to underscore the serious problems in his record.

As you know, as a member of the Commission on Opportunity in Athletics, Mr. Griffith not only joined in a series of recommendations adopted by a majority of the Commission that would have done serious damage to Title IX—recommendations that were rejected by the Secretary of Education—but submitted an even more extreme proposal of his own that was soundly rejected even by the Commission.

Mr. Griffith's proposal to eliminate one well-established way schools can come into compliance with Title IX's non-discrimination requirement in athletics—the proportionality test—was so controversial that the Commission rejected it by a margin of

11 Dupont Circle ■ Suite 800 ■ Washington, DC 20036 ■ 202.588.5180 ■ 202.588.5185 Fax ■ www.nwlc.org

11 to 4. Moreover, Mr. Griffith himself recognized that his proposal was "radical." (CD-Rom recording of remarks at 43rd Annual Conference of National Association of College and University Attorneys, June 22, 2003.)

Mr. Griffith's explanation for his opposition to the proportionality test during Commission proceedings raised concerns about his willingness to ignore court decisions with which he personally disagrees. Mr. Griffith claimed that the proportionality test violated the Equal Protection Clause of the Constitution and was "illegal," "unfair" and "wrong" and even "morally wrong," (Transcript of Commission hearing, Jan. 30, 2003, at 27), despite the fact that every Circuit Court of Appeals to have considered the legality of the proportionality test has upheld it. When confronted with the fact that his view of Title IX was in conflict with the conclusions of the courts, Mr. Griffith cavalierly asserted that the courts got it "wrong," (*see, e.g.,* Transcript of Commission hearing, Jan. 30, 2003, at 28), and stated, "I for one don't believe in the infallibility of the judiciary" (Transcript of Commission hearing, Jan. 30, 2003, at 106).

Mr. Griffith's statements about the unlawfulness of the proportionality test suggested that he believes the test constitutes a quota. This belief is incorrect. In the athletics context, where men and women participate on separate teams, schools necessarily make an explicit gender-based allocation of opportunities when they decide which men's and women's teams and how many spots on each they will offer. Therefore, the proportionality test merely determines whether schools are setting the sex-segregated numerical limits they place on athletic participation opportunities in a non-discriminatory way. Further, the proportionality test is only one of three ways that schools can demonstrate their compliance with Title IX in the athletics context; they can also do so by showing that they are fully accommodating the interests and abilities of the underrepresented sex, or that they have a history and continuing practice of expanding opportunities for the underrepresented sex. For these reasons, every federal appellate court to consider whether the implementing regulations of Title IX create quotas has concluded that they do not—Mr. Griffith's apparent conclusion to the contrary notwithstanding. For instance, in *Cohen v. Brown University*, 101 F.3d 155, 170 (1st Cir. 1996), the court stated that "No aspect of the Title IX regime at issue in this case—inclusive of the statute, the relevant regulation, and the pertinent agency document—mandates gender-based preferences or quotas, or specific timetables for implementing numerical goals."

Mr. Griffith's attempts to explain away his radical views on Title IX in a November 19, 2004 letter to then-Chairman Hatch and in responses to written questions from several Senators do nothing to resolve our concerns.

In his written answers, despite having called it "illegal" and claiming that the courts got it wrong, Mr. Griffith said that he opposed the proportionality test merely because some have "misused" or "misinterpreted" the test to create quotas. (*See, e.g.,* Response of Thomas B. Griffith to the Written Questions of Senator Edward M. Kennedy, Dec. 3, 2004, at 1, 3). He also asserted that when he said that courts that have

uniformly upheld the proportionality test "got it wrong," he really meant only that the proportionality test should be permissible but not required. (Responses of Thomas B. Griffith to the Written Questions of Senator Joseph R. Biden, Jr., Dec. 3, 2004, at 3). However, the proportionality test is already "permissible" and not required; it is merely one of three ways that schools may comply with Title IX. Mr. Griffith's current explanations are belied by his actual proposal to eliminate the proportionality test in its entirety—not to make it "permissible"—and do not acknowledge, much less explain, his prior categorical rejection of the legality of the test.

Others of Mr. Griffith's attempted explanations also raise more questions than they resolve. He assured the Senate Judiciary Committee that he would put aside his personal "policy preferences" if confirmed as a federal judge (*id.*), but he failed to explain how he would disregard his legal conclusion that the proportionality test does not "accurately capture[] the imperatives of Title IX" (Letter from Thomas B. Griffith to Chairman Orrin G. Hatch, Nov. 19, 2004, at 2). He stated that he does not oppose the use of numeric measures in the employment discrimination and affirmative action contexts, but this assurance cannot be squared with his active opposition to the proportionality prong, which merely measures whether women and men are being provided equal opportunities in the unusual and especially compelling context of sports, which are already sex-segregated.

Finally, he characterized the proposals he supported regarding the proportionality test (with the exception of his own proposal to eliminate the test) as "modest" or "moderate" (Responses of Thomas B. Griffith to the Written Questions of Senator Patrick J. Leahy, Dec. 3, 2004, at 14), when they were so controversial that the Secretary of Education rejected them along with all the other proposals put forth by the Commission.

In addition to all of the concerns raised by Mr. Griffith's position on Title IX, evidence reveals that Mr. Griffith violated the rules of his profession by practicing law without a license in two different jurisdictions over a period of several years. Documents made public at his November hearing also raise serious questions about whether he gave accurate information under oath about that lapse. These ethical violations, his failure to address them accurately, and his failure to describe his Title IX proposal accurately, together with Mr. Griffith's dismissive attitude towards court decisions with which he does not agree, demonstrate a pattern of lack of respect for the rule of law that is unacceptable in a candidate for a lifetime seat on the federal bench.

In light of Mr. Griffith's record on issues of critical importance to women, and evidence of ethical lapses on his part, we urge you to take a stand against this nomination. A detailed analysis of Mr. Griffith's responses to written questions is attached. If you have questions or if we can be of assistance, please contact us at (202) 588-5180.

Sincerely,

Nancy Duff Campbell
Co-President

Marcia D. Greenberger
Co-President

cc: Senate Judiciary Committee

Enclosure

NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

Analysis of Written Responses of Thomas Griffith:
Mr. Griffith's Responses Underscore Concerns About His Views on Title IX and About His Respect for the Rule of Law

The Title IX "three-part test" has been in place since 1979 and offers schools three independent ways to show that they are providing equal opportunities to men and women to participate in sports. The first, "proportionality," prong of the test embodies the principle at the heart of Title IX: that men and women are entitled to equal access to educational opportunities without regard to their gender or stereotypes about their interests and abilities. As every federal court of appeals to consider the issue has recognized – and as every Administration since 1979 has understood – the three-part test is legally valid, and the proportionality prong does not impose quotas.

Despite this uniform guidance, Mr. Griffith, as a member of the Department of Education's Title IX Commission, proposed to altogether eliminate the proportionality prong. Mr. Griffith would have barred schools from proving that they are in compliance with Title IX by showing that they offer their male and female students equal opportunities to play sports. His approach would drastically limit schools' flexibility, enshrine the stereotype that women are not as interested as men in athletics, and limit further growth in women's participation opportunities. This proposal was so controversial that even the Commission – stacked with members hostile to Title IX – rejected it by a margin of 11 to 4.

Nothing in Mr. Griffith's responses allays the concerns raised by his record that he holds radical views on Title IX, and his failure to accurately describe and explain those views is very troubling.

- To attempt to explain his opposition to the proportionality test, Mr. Griffith now says simply that some have "misused" or "misinterpreted" the test to create quotas, and that he does not believe that the proportionality test "inevitably leads to the use of gender quotas." (*See, e.g.*, Response of Thomas B. Griffith to the Written Questions of Senator Edward M. Kennedy at 1, 3 (Dec. 3, 2004).)

- If Mr. Griffith truly believed that the problem is that the proportionality prong has been misused, the appropriate response would be to provide education on the proper interpretation of the law – not to propose, as Mr. Griffith did, that the proportionality test be eliminated in its entirety.

- In fact, Mr. Griffith's current description of his views on Title IX is inconsistent with his previous statements in which he has clearly stated that he opposes the proportionality test itself. As a member of the Title IX Commission, he stated that he opposed the proportionality test based on its use of "numeric formulas" to determine whether a college or university is complying with Title IX—and that those formulas violate the Equal Protection Clause of the Constitution and are "illegal," "unfair" and "wrong," and even "morally

wrong." (Transcript of Commission hearing, Jan. 30, 2003, at 27.) In fact, contrary to his current claim that he thinks the proportionality test has simply been "misused," Mr. Griffith said as recently as November 19, 2004, in a letter to Chairman Hatch, that "although the use of [numeric] formulas had been held by the court[s] to be permissible, I did not believe that such formulas accurately captured the imperatives of Title IX."

Nothing in Mr. Griffith's responses allays the concerns raised by his record that he has prejudged the validity of the three-part test under Title IX, and that his view is contrary to that of all the appellate courts to consider the issue.

- Mr. Griffith assures this Committee that he would "apply the law impartially regardless of my personal policy preferences." (Responses of Thomas B. Griffith to the Written Questions of Senator Joseph R. Biden, Jr. at 3 (Dec. 3, 2004).) He tries to "clarify" his cavalier dismissal of the rulings of the no fewer than six federal appellate courts that have upheld the proportionality test, claiming that he meant only that "even if substantial proportionality is a permissible means, it is not a required means" of compliance with the statute and that "the Commission was free to recommend other means to expand opportunities for women." (*Id.*)

- But these assurances are belied by Mr. Griffith's previous statements that, *as a legal matter*, the courts that upheld the proportionality test "got it wrong" and that he does not "believe in the infallibility of the judiciary" (Transcript of the Commission hearing, Jan. 30, 2003 at 28, 106) – as well as by his proposal to the Commission to eliminate the proportionality test as a permissible means of compliance altogether. Mr. Griffith's record on the Commission shows that, at a minimum, he has inappropriately prejudged a legal issue under Title IX that is likely to come before him, and that his views reflect his legal analysis – not "personal policy preferences."

Mr. Griffith's statements about the Commission recommendations he supported significantly understate his efforts to gut the three-part test.

- Mr. Griffith tries to obfuscate his hostility to the proportionality test while on the Commission by saying now that – in addition to his own proposal to eliminate the proportionality test, rejected by a Commission vote of 11 to 4 – he supported or sponsored three other Commission recommendations to address concerns about the proportionality prong that were both "modest" or "moderate" and were unanimously supported by the Commission. (Responses of Thomas B. Griffith to the Written Questions of Senator Patrick J. Leahy at 14 (Dec. 3, 2004).)

- These statements are, at best, highly misleading. In the first instance, two of the Commissioners withdrew their consent to one of the recommendations which Mr. Griffith persists in labeling unanimous. Moreover, Mr. Griffith's statements ignore at least seven additional non-unanimous recommendations adopted by the Commission – recommendations that Mr. Griffith has never disavowed – that would have critically weakened Title IX's athletics policies and would have resulted in substantial losses of participation opportunities and scholarships for women. Even apart from Mr. Griffith's own proposal to eliminate

proportionality, the Commission's recommendations were so damaging to Title IX that they were ultimately rejected in their entirety by the Secretary of Education after a public outcry.

Mr. Griffith's responses confirm concerns about his opposition to the use of statistical evidence to identify discrimination in contexts beyond Title IX.

- Mr. Griffith says that his views on the proportionality test are not "a criticism of the use of statistical evidence in civil rights disputes." (*See, e.g.*, Response of Thomas B. Griffith to the Written Questions of Senator Edward M. Kennedy at 3 (Dec. 3, 2004).)

- But if, as Mr. Griffith has said, he believes that numeric measures in the Title IX context constitute quotas, cannot be used to measure the existence of discrimination, and are a "fundamentally unfair way of going about remedying discrimination," (Transcript of Commission hearing, Jan. 30, 2003, at 107), it is very difficult to understand how he could accept numeric measures as measurements of discrimination in the context of employment or affirmative action.

- In fact, Mr. Griffith's responses to the Committee confirm that he views the use of statistical evidence with suspicion. He states that statistical evidence may permissibly be used to show a gender imbalance under Title IX, but then asserts that "numeric formulas [cannot] be used to grant members of one sex preferential treatment to correct an imbalance." (Response of Thomas B. Griffith to the Written Questions of Senator Edward M. Kennedy at 3 (Dec. 3, 2004).) But as Mr. Griffith should know, and as the courts have uniformly made clear, the use of statistical evidence to assess compliance with the proportionality test in no way constitutes preferential treatment for women. Mr. Griffith's reference to Title IX's "numerical formulas" as constituting "preferential treatment" suggests that he views any diagnostic or remedial use of statistics as imposing impermissible quotas.

Mr. Griffith's admission that he practiced law without a license for a period of several years, and his apparent failure to give accurate information about that lapse while under oath, add to the concerns about his general respect for the rule of law.

- Mr. Griffith has admitted that he practiced law in the District of Columbia for several years while he was suspended from the District of Columbia Bar for nonpayment of dues, and that since 2000 he has practiced law in Utah without being a member of the Utah Bar. (Responses of Thomas B. Griffith to the Written Questions of Senator Patrick J. Leahy, Dec. 3, 2004, at 2, 13, 15.)

- Mr. Griffith has attempted to explain his failure to join the Utah Bar by stating that it was his "understanding" that as in-house counsel to Brigham Young University he did not need to be a member of the state Bar. (Responses of Thomas B. Griffith to the Written Questions of Senator Patrick J. Leahy, Dec. 3, 2004, at 8.) However, documents made public at Mr. Griffith's hearing show that the General Counsel of the Utah State Bar instructed Mr. Griffith in writing in 2003 that "Utah does not have and has never had" a "general counsel rule exception." (Letter from Katharine A. Fox to Thomas B. Griffith, dated May 14, 2003.)

- Additional documents made public at Mr. Griffith's hearing raise serious questions about whether Mr. Griffith gave accurate information about his lapsed District of Columbia Bar membership while under oath to the Utah Bar. Specifically, in a sworn November 2003 application to take the Utah Bar examination, Mr. Griffith was asked whether he had ever been suspended as an attorney, and—despite the fact that he knew he had been suspended from the District of Columbia Bar—he answered "no." Mr. Griffith's explanation for his failure to disclose his suspension, namely that he "read the question as calling for information whether the applicant had ever been sanctioned for misconduct by a disciplinary authority," (Responses of Thomas B. Griffith to the Written Questions of Senator Patrick J. Leahy, Dec. 3, 2004, at 9.) ignores the plain language of the question, which simply asks if the applicant has ever been "disbarred, suspended, censured, sanctioned, disciplined or otherwise reprimanded or disqualified" as an attorney. In the same application, Mr. Griffith was asked whether he had ever held himself out as an attorney in Utah. He answered that when he had acted as an attorney while at BYU, he had "done so as a member of the Bar of the District of Columbia." This was despite the fact that he knew he had been suspended from the District of Columbia Bar for over a year while he was working at BYU. (Application of Thomas B. Griffith to the Utah State Bar Examination, November 2003, questions 52, 46.)

These ethical violations, Mr. Griffith's failure to address them accurately, and his failure to describe his Title IX proposal accurately, together with his dismissive attitude towards court decisions with which he does not agree, demonstrate a pattern of lack of respect for the rule of law that is unacceptable in a candidate for a lifetime seat on the federal bench.

June 17, 2004

RE: Griffith Nomination to DC Circuit

Dear Senator:

We understand that the Judiciary Committee will soon take up the nomination of Thomas Griffith to the U.S. Court of Appeals for the District of Columbia Circuit (with a hearing now scheduled for June 23), and we write to urge you to oppose this nomination.

As an organization dedicated to advancing and protecting women's legal rights, the National Women's Law Center has carefully reviewed Mr. Griffith's record on legal issues of importance to women. Mr. Griffith has a record of hostility to a key component of Title IX of the Education Amendments of 1972 – the landmark federal law that prohibits sex discrimination in every sphere of education, and that has opened up tremendous opportunities for girls and women to play sports, obtain college scholarships, and receive the significant health, emotional and academic benefits that flow from athletic participation. Mr. Griffith has taken a position on Title IX in the athletics context that raises broad concerns about his approach to both Title IX more generally and to other civil rights protections. Our concerns are magnified in light of the particular importance of the D.C. Circuit, especially on issues involving review of government policies; indeed, this court is widely considered second in importance only to the U.S. Supreme Court.

In 2002, the Secretary of Education appointed Mr. Griffith to the Commission on Opportunity in Athletics to evaluate whether and how current standards governing Title IX's application to athletics should be revised. The Commission made a series of recommendations that would have done serious damage to Title IX. After a public outcry, the Secretary rejected the Commission recommendations that would have brought harmful changes to longstanding Title IX interpretations.

Mr. Griffith not only joined in supporting the Commission's harmful recommendations, he offered the most dangerous proposal of all – to eliminate entirely the "substantial proportionality" test for compliance, which as one of the three alternative ways to comply with Title IX, allows educational institutions to comply by offering athletic opportunities to male and female students that are in substantial proportion to each gender's representation in the student body of the school. Eliminating the proportionality test could be fatal to Title IX's effectiveness. Fortunately, the Commission rejected Mr. Griffith's proposal, by a lopsided vote of 11 to 4.

Mr. Griffith argued that the proportionality test is both unconstitutional and inconsistent with the language and purpose of Title IX, declaring that "it is illegal, it is unfair, and it is wrong." (Transcript of Commission hearing, Jan. 30, 2003 at 26.) But

11 Dupont Circle ■ Suite 800 ■ Washington, DC 20036 ■ 202.588.5180 ■ 202.588.5185 Fax ■ www.nwlc.org

this view flies in the face of the decisions of eight Circuit Courts (every one to consider the issue) that have upheld the test. Mr. Griffith showed complete disregard for these decisions, dismissing them as "wrong." (See, e.g., Transcript of Commission hearing, Jan. 30, 2003 at 26-27.) In reality, the courts have properly recognized that the proportionality test is simply a logical way to measure whether, in athletic programs that are segregated by sex, schools are providing female students and male students with equal opportunities to play, and thus to ensure that schools allocate participation opportunities non-discriminatorily – which is at the very heart of Title IX's mandate. Mr. Griffith was thus correct when he described his proposal to eliminate the proportionality test as "radical." (CD-Rom recording of remarks at 43rd Annual Conference of National Association of College and University Attorneys, June 22, 2003.) In short, Mr. Griffith's views on how to evaluate discrimination even in this compelling context are unsupportable and outside the mainstream.

Mr. Griffith's views on Title IX also raise concerns about his approach to other critical civil rights issues. His opposition to numerical measures even in sex-segregated settings, where they are simply means of determining whether discrimination is occurring in the allocation of opportunities, suggests that he would be at least as hostile, if not more so, to numerical approaches in other areas of civil rights law. These include affirmative action remedies for discrimination in employment or contracting, and the use of statistical evidence to prove that facially neutral employment practices have a disparate, adverse impact on women or racial or ethnic minorities.

No judicial nominee enjoys a presumption in favor of confirmation. It is the nominee who carries the burden of convincing the Senate that he or she should be confirmed, and any doubts should be resolved against confirmation. Based on Thomas Griffith's record on issues of critical importance to women, we submit that he should not be confirmed. It would be especially inappropriate to confirm this nominee in light of the longstanding Senate practice of approving only non-controversial Court of Appeals nominees at this stage in a Presidential election year; for the reasons given above, this nomination cannot be considered "non-controversial," and it should not be rushed through the Senate.

We urge you to take a stand against this nomination. If you have questions or if we can be of assistance, please contact us at (202) 588-5180.

Sincerely,

Nancy Duff Campbell
Co-President

Marcia D. Greenberger
Co-President

June 9, 2004

The Honorable Orrin Hatch, Chair
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Patrick Leahy, Ranking Member
Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, D.C. 20510

Re: *Nomination of Thomas Griffith to D.C. Circuit*

Dear Chairman Hatch and Senator Leahy:

Given the serious concerns that have been raised by the National Women's Law Center and numerous other organizations about Thomas Griffith's record on Title IX, I am writing to bring to your attention an item that should be made part of the record on his nomination to the D.C. Circuit: the verbatim record of a panel on which Mr. Griffith appeared at the 43rd Annual Conference of the National Association of College and University Attorneys (NACUA) on June 22-23, 2003 on the topic of Title IX and equal athletic opportunity for women.

As you are aware, Mr. Griffith served as a member of the Commission on Opportunity in Athletics created by the Secretary of Education in 2002. As a Commission member, Mr. Griffith offered a proposal that would have eviscerated the standards governing Title IX's application to athletics, by eliminating entirely a key provision that allows educational institutions to comply with the law by offering athletics opportunities to male and female students that are in substantial proportion to each gender's representation in the student body of the school. Mr. Griffith's proposal was extreme and unsupportable, and flew in the face of the decisions of eight Circuit Courts (every one to consider the issue) that have upheld the provision he sought to eliminate. Fortunately, the Commission rejected Mr. Griffith's proposal by a vote of 11 to 4.

On the June 2003 NACUA panel, Mr. Griffith frankly acknowledged that his proposal to weaken Title IX's protections was "radical." As documented by a CD recording of the panel discussion (provided to the Center as a participant on the panel), Mr. Griffith said:

> "There was only one radical proposal that was offered, and I offered it, and it lost. I offered a proposal to get rid of substantial proportionality. I could only get four votes out of the Commission so it went down in flames and wasn't the work of the Commission."

This CD does not appear to be publicly available, and if Mr. Griffith has not provided it to the Committee, we would be pleased to make the Center's copy available to you. To obtain access to it, please contact me or Judy Appelbaum, the Center's Vice President and Legal Director, at 202-588-5180.

Sincerely,

Marcia D. Greenberger
Co-President

KIRTON & McCONKIE
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
1800 EAGLE GATE TOWER
60 EAST SOUTH TEMPLE
P.O. BOX 45120
SALT LAKE CITY, UTAH 84145-0120
www.kmclaw.com

ERIC C. OLSON
E-MAIL: colson@kmclaw.com

FAX (801) 321-4893
TELEPHONE (801) 328-3600

June 21, 2004

VIA FAX (202-228-1698) AND U. S. MAIL

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

RE: Nomination of Thomas B. Griffith

Dear Mr. Chairman:

I write in support of the nomination of Thomas B. Griffith to the United States Court of Appeals for the District of Columbia Circuit.

My acquaintance with Tom goes back to my second year in law school (1981) at the University of Virginia in Charlottesville, Virginia, at the time Tom commenced his legal studies at the University. What impressed me most about Tom then, and continues to distinguish him to this day, was his combination of intellect and fundamental humanity. Tom has a mind that grasps the intricacies of the law. At the same time, he has a humility and generosity that keep his understanding of the law always in a real world perspective. He is not a prisoner of any ideology or disposition.

As a person, Tom is accessible, down to earth, optimistic, and dignified. It comes as no surprise to me that he has enjoyed such success, and made such a vital contribution for good, during the course of his legal career. I would particularly note that, in the midst of his professional attainments, he has demonstrated a sensitivity to public service and has lent his name and skills to many worthy causes.

I believe that the United States Senate has a unique opportunity to place on the federal bench one who is not only more than qualified to deal with the legal issues constantly before any

appellate court, but one also qualified by character and disposition to arrive at truly just results for the benefit of all.

Sincerely,

KIRTON & McCONKIE

Eric C. Olson

ECO:bb

cc: The Honorable Patrick J. Leahy – via fax (202-224-9516) and U.S. Mail
Office of Legal Policy – via fax (202-514-5715)

762604

March 7, 2005

Hon. Arlen Specter, Chairman
Senate Judiciary Committee
711 Hart Senate Office Building
United States Senate
Washington, D.C. 20510

Hon. Patrick Leahy, Ranking Member
Senate Judiciary Committee
433 Russell Senate Office Building
United States Senate
Washington, D.C. 20510

Dear Senator Specter and Senator Leahy:

I am writing on behalf of People For the American Way and our more than 600,000 members and activists nationwide to reiterate our continuing opposition to the confirmation of Thomas B. Griffith to the United States Court of Appeals for the District of Columbia Circuit. For the reasons discussed in our letter to the Committee of November 11, 2004, Mr. Griffith has not met the high burden of demonstrating that he satisfies the criteria for a lifetime appointment to the second highest court in our nation.

In particular, the extreme positions that Mr. Griffith has taken on Title IX -- one of this country's most important anti-discrimination laws -- reflect that, if confirmed, he would pose a threat to this and other laws crucial to securing equality of treatment and equal opportunity for every American. In addition, Mr. Griffith's continuing practice of law in Utah without being admitted to the state Bar as required by statute, coupled with his suspension on two separate occasions from the District of Columbia Bar for failure to pay mandatory Bar dues, indicate that he is, at best, someone with a disturbingly cavalier approach to his legal obligations, and, at worst, someone who considers himself above the law. In either case, far from exemplifying the highest standards of the legal profession -- standards we should demand of all federal judges -- Mr. Griffith fails to satisfy the minimum criteria for a lifetime position judging others.

Significantly, Mr. Griffith's testimony at his hearing on November 16, 2004 and his written answers to post-hearing questions not only failed to dispel the very serious concerns that had been raised about his record but in fact reinforced them, as discussed

2000 M Street, NW ♦ Suite 400 ♦ Washington, DC 20036
Telephone 202.467.4999 ♦ Fax 202.293.2672 ♦ E-mail pfaw@pfaw.org ♦ Web site http://www.pfaw.org

below. Nonetheless, President Bush has re-nominated Griffith, as well as several other extremely troubling appellate court nominees. In so doing, President Bush has continued to fail to undertake meaningful bipartisan consultation in the nominations process and to disrespect the Senate's constitutional role of advise and consent. Rather than seek advice from Senators and find qualified, mainstream nominees, the President apparently believes he is entitled to confirmation of every single one of his nominees, notwithstanding that the Constitution's explicit requirement of Senate consent would be superfluous if that were the case. The President has been appropriately criticized by editorial writers for his evident plans to pursue this "scorched-earth tactic."[1]

It is critical to the protection of the rights and interests of all Americans that the Senate continue to scrutinize carefully the records of all judicial nominees, and to reject those who fail to satisfy the important criteria for lifetime appointments to the federal bench. As discussed below and in our letter of November 11, 2004, it is clear that Mr. Griffith does not meet those criteria and should not be confirmed.

I. Mr. Griffith's testimony did not resolve concerns regarding his extreme legal positions on Title IX

As we explained in our initial letter to the Committee, and as has also been explained by the National Women's Law Center and other leading organizations concerned with eradicating gender discrimination in our society, Mr. Griffith, as a member of the Commission on Opportunity and Athletics, has taken extreme legal positions on Title IX that belie a commitment to the progress made on women's rights in this country. These actions also reflect a troubling legal philosophy.

In particular, as a Commission member, Mr. Griffith proposed the elimination of the "proportionality test" -- one prong of the independent three-part test that has long been used for determining compliance with Title IX.[2] Griffith's proposal was so radical that it was rejected by the Commission itself, a body dominated by individuals willing to weaken Title IX significantly. Mr. Griffith's efforts to eliminate the proportionality test appear to reflect a legal view that is clearly out of the mainstream and that would seriously undermine important legal principles that have protected women from discrimination. In addition, the legal

---

[1] "Plan to Fight for Previously Rejected Judges Isn't Worth It," *USA Today* (Jan. 2, 2005). See also, e.g., "Wrong Step on Judges," *Washington Post* (Jan. 3, 2005), at A12.

[2] Under this prong of the test, a school is in compliance with Title IX if it can demonstrate that the athletic opportunities for males and females are in substantial proportion to each gender's representation in the student body of the school.

positions that Mr. Griffith took in support of his proposal, specifically the fact that he was "unalterably opposed" to what he called the use of "numeric formulas" to evaluate Title IX compliance, which he contended violates the Equal Protection Clause,[3] also raise serious questions about his legal views concerning other important aspects of civil rights laws.

None of these serious concerns was dispelled by Mr. Griffith's responses to questions posed by members of this Committee. To the contrary, in his effort to explain away his opposition to the proportionality test, Mr. Griffith now claims merely that some have "misused" the test to create quotas, and that he does not believe that the proportionality test "inevitably leads to the use of gender quotas."[4] However, if it were truly Mr. Griffith's belief that the proportionality test has been misused rather than that it is wrong, then the appropriate remedy would not be to eliminate that test, as Mr. Griffith proposed, but to take steps to provide others with the proper interpretation of the law.

Despite his recent efforts to obscure his position, Mr. Griffith has previously made it very clear that he opposes the proportionality test itself, as detailed in our initial letter to the Committee. Indeed, he has dismissed as legally wrong the rulings of the numerous courts of appeal that have considered and upheld the proportionality test.

In a further effort to minimize his hostility to the proportionality test, Mr. Griffith has now characterized as "modest" or "moderate" other Commission proposals that he supported or sponsored addressing that test.[5] In fact, far from being "modest" or "moderate," the Commission's recommendations, including others also supported by Mr. Griffith, would have been so damaging to Title IX that they prompted a public outcry and were rejected in their entirety by Secretary of Education Rod Paige.

II. Mr. Griffith's testimony did not resolve, and indeed reinforced, concerns about his continuing practice of law in Utah without being licensed to do so, as required by statute, and his suspension from the D.C. Bar for failing to pay mandatory dues

As noted above, prior to Mr. Griffith's hearing, very serious concerns had arisen because he has been practicing law in Utah for

---

[3] See Transcript of the Jan. 30, 2003 hearing of the Commission on Opportunity in Athletics, at 26-27.

[4] Response of Thomas B. Griffith to the Written Questions of Senator Edward M. Kennedy at 3 (Responses 2a, 2b)(Dec. 3, 2004).

[5] Responses of Thomas B. Griffith to the Written Questions of Senator Patrick J. Leahy at 14 (Response 29) (Dec. 3, 2004).

more than four years without having become a member of the Utah Bar, when state law expressly requires everyone engaged in the practice of law in Utah to be admitted to the Utah Bar. Utah Code Ann. § 78-9-101(1). These concerns, which are significant in and of themselves, also exist against the backdrop of Mr. Griffith's three-year suspension from the District of Columbia Bar for failure to pay his mandatory Bar dues, a time during which he continued to practice law in D.C. and then in Utah. Not only did Mr. Griffith's hearing testimony fail to resolve these concerns, but new and disturbing information also emerged about Griffith's record and his clear failure to comply with his legal obligations.

- **Griffith gave false answers, under oath, to the Utah State Bar**

For example, documents released to the public at Mr. Griffith's hearing reveal that in November 2003, he gave a false answer, under oath, to the Utah Bar that he had never been "suspended" as an attorney. Question 52 on an application that Griffith signed under oath on November 19, 2003 to take the Utah Bar exam -- an exam he never ultimately took -- asked, "Have you ever been disbarred, suspended, censured, sanctioned, disciplined or otherwise reprimanded or disqualified, whether publicly or privately, as an attorney?" (Emphasis added.) Mr. Griffith answered "No" to this question, although, as he knew then, he had been suspended by the D.C. Bar for three years (from Nov. 1998-Nov. 2001).[6]

When Senator Hatch asked Mr. Griffith at his hearing about the very clear discrepancy between his written answer to Question 52 and the actual facts, Griffith testified that "the thought never crossed my mind that the question might relate to a temporary lapse due to an inadvertent failure to pay bar dues." Given the very clear wording of Question 52, however, which contains no qualification or exception for the type of suspension, as well as the opportunity on the form itself for Griffith to have explained a "yes" answer, in addition to the fact that the question was to be answered under oath, Griffith's testimony was extremely troubling.[7]

---

[6] According to questions posed to Mr. Griffith by Senator Leahy, Griffith wrote a letter to the D.C. Bar on Nov. 7, 2001 stating that he had been "suspended for non-payment of dues . . . ." Responses of Thomas B. Griffith to the Written Questions of Senator Patrick J. Leahy at 9 (Question 21)(Dec. 3, 2004).

[7] In his answers to post-hearing questions, Mr. Griffith compounded his effort to read a limitation into Question 52 that simply was not there, stating "I read the question as calling for information whether the applicant had ever been sanctioned for misconduct by a disciplinary authority, which I have never been." Responses of Thomas B. Griffith to the Written Questions of Senator

The documents released at Mr. Griffith's hearing also revealed that he had given another problematic answer, under oath, to the Utah Bar. Question 46 of the Bar application that Griffith signed under oath on November 19, 2003 asked, "Have you ever given legal advice and/or held yourself out as an attorney, lawyer, or legal counselor in the state of Utah? If 'Yes,' please provide a full explanation . . . " Mr. Griffith answered "yes," and further stated "Since August 2000, I have served as Assistant to the President and General Counsel at Brigham Young University. When called upon to act in my capacity as an attorney, I have done so as a member of the Bar of the District of Columbia . . ." (Emphasis added.) However, as Mr. Griffith well knew when he answered this question, at the time he began working at BYU in August 2000, he had been suspended from the D.C. Bar, a suspension not lifted until Nov. 2001.

- **Griffith has been suspended not once, but twice, by the D.C. Bar, and also has not disclosed the first suspension in either set of answers to the Judiciary Committee's questionnaire**

It was also learned after Mr. Griffith's hearing that he has been suspended not once but twice by the D.C. Bar for failing to pay mandatory Bar dues. According to Griffith's answers to post-hearing questions, "While working as Senate Legal Counsel, I was late in the payment of my bar dues in 1996 and 1997. My 1997 dues were not paid until January 1998, causing a temporary suspension of little over a month."[8] This was in addition to Griffith's three-year suspension from the D.C. Bar (Nov. 1998-Nov. 2001), which previously had been disclosed publicly.

Nevertheless, Mr. Griffith did not identify his first suspension from the D.C. Bar in his answers to the Senate Judiciary Committee's questionnaire that he submitted in May 2004, nor did he identify it in the answers that he submitted to the Committee (under oath) on February 15, 2005 in connection with his re-nomination. This is despite the fact that Question 11 of the Committee's questionnaire specifically required Mr. Griffith to "List all courts in which you have been admitted to practice, with dates of admission and lapses if such memberships lapsed. Please explain the reason for any lapse of membership." (Emphasis added.)

Patrick J. Leahy at 9 (Response 21)(Dec. 3, 2004).

[8] Responses of Thomas B. Griffith to the Written Questions of Senator Patrick J. Leahy at 1 (Response 2)(Dec. 3, 2004).

- **The Utah State Bar specifically informed Griffith that there is no "general counsel" exception to state law requiring all practicing attorneys to be licensed in the state and advised Griffith to take the state Bar exam, advice Griffith has never followed**

Another document released at Mr. Griffith's hearing clearly reinforced the concerns about his failure to seek admission to the Utah Bar and his explanations for such failure. A letter to Mr. Griffith dated May 14, 2003 from Katherine A. Fox, General Counsel of the Utah Bar, specifically advised him that "Utah does not have and has never had" a "general counsel rule exception." In this same letter, Ms. Fox also advised Griffith that, since there was no general counsel exception to the law requiring all attorneys practicing in Utah to be admitted to the Utah Bar, and since Griffith was not eligible to waive into the Utah Bar, he was "fortunate, however, to have a viable option remaining, i.e., admittance by examination," and she "encourage[d] [him] to start preparing [his] application as soon as possible."

Ms. Fox concluded her May 14, 2003 letter to Griffith by again reminding him that

> we have no general counsel exception rule allowing individuals who serve in such positions to actually practice law without Utah licensure. Towards that end, it would be a prudent course of action to limit your work to those activities which would not constitute the practice of law. If such activities are unavoidable, I strongly urge you to closely associate with someone who is actually licensed here and on active status. Finally, just so you know, all applicants are required to undergo a character and fitness assessment prior to being permitted to take the examination. Practicing law without a Utah license has been an issue for some applicants in the past and has resulted in delayed admission or even denial.

Despite this letter from the General Counsel of the Utah Bar, Mr. Griffith still has never taken the Utah Bar exam nor been admitted to the Utah Bar, but has continued to engage in the practice of law in Utah.

- **Griffith's post-hearing written answers did not resolve and in fact reinforced these serious concerns**

A number of Senators posed post-hearing questions to Mr. Griffith regarding his Bar problems and lapses. Mr. Griffith's answers to those questions did not resolve the concerns regarding his continuing unlicensed practice of law in Utah. To the contrary, in his answers Mr. Griffith has admitted that he has "practiced law in Utah since beginning my responsibilities as Assistant to the

President and General Counsel at Brigham Young University in August 2000."[9]

Mr. Griffith has attempted to avoid responsibility for violating Utah state law requiring that everyone practicing law in the state be licensed to do so by claiming that it is permissible for him to practice law in Utah without being admitted to the state Bar so long as he is "associated" with a Bar member.[10] However, Griffith has admitted in his written answers that there is no such "association" exception in the Utah statute requiring that every person practicing law in the state must be a licensed member of the Utah Bar.[11] He has further admitted that "I am aware of no sections of the Utah Bar rules that expressly permit an unlicensed attorney to practice in 'close association' with a Utah-licensed lawyer."[12] Worse, according to Griffith's answers, he believes that he may continue to practice law "indefinitely" in Utah as the General Counsel of BYU without ever becoming a member of the Utah Bar, so long as he is "closely associated" with a Bar member.[13] But in responding to Senators' written questions, Griffith could cite to no Utah statute or Utah Bar rule that supports such a contention, nor any advice from the Bar authorizing him to practice in the state indefinitely without being admitted to the Bar.

To the contrary, the letter sent to Griffith on May 14, 2003 by Utah Bar General Counsel Katherine A. Fox, quoted above, admonished Griffith to start preparing his application to take the Utah Bar exam "as soon as possible." Under no objective reading of this letter could it be concluded that an attorney working as a general counsel could continue to practice law indefinitely in Utah without taking the Bar exam and being admitted to the state Bar. The only fair reading of Ms. Fox's advice about being "closely

---

[9] Responses of Thomas B. Griffith to the Written Questions of Senator Russell D. Feingold at 1 (Response 1)(Dec. 3, 2004). See also Responses of Thomas B. Griffith to the Written Questions of Senator Patrick J. Leahy at 12 (Response 26a)(Dec. 3, 2004)("As Assistant to the President and General Counsel of the University, I routinely give legal advice to the President of the University, members of the President's Council . . . and administrators, staff, and employees of the University").

[10] See, e.g., Responses of Thomas B. Griffith to the Written Questions of Senator Dianne Feinstein at 1 (Response 1)(Dec. 3, 2004).

[11] Responses of Thomas B. Griffith to the Written Questions of Senator Russell D. Feingold at 7 (Response 6iii)(Dec. 3, 2004).

[12] Responses of Thomas B. Griffith to the Written Questions of Senator Dianne Feinstein at 3 (Response 7)(Dec. 3, 2004).

[13] Responses of Thomas B. Griffith to the Written Questions of Senator Russell D. Feingold at 9 (Response 9ii)(Dec. 3, 2004).

associated" with an active Bar member is that it was a temporary measure to be undertaken by someone until he could take the Bar exam (which Griffith has had at least eight opportunities to take in the past four years).[14] Any other reading, including Griffith's self-serving reading, would mean the Utah Bar has effectively amended state statutory law by creating a "general counsel" exception to the statute requiring that everyone practicing law in the state must be admitted to the Bar, an exception that Griffith himself admits does not exist and that the Utah Bar has specifically informed him does not exist.

It is also worth noting that Mr. Griffith admitted in his written answers that he does not always have Utah Bar members present with him when he renders legal advice to or otherwise discusses legal matters with his clients -- BYU officials. According to Griffith, "it has not been my understanding that it is necessary to have a Utah lawyer present on each of those occasions . . ."[15] According to Griffith, citing no authority, it is sufficient for him to consult with Utah lawyers. Among those lawyers, he says, are the other attorneys in his office, the very same attorneys that he, as the General Counsel, is charged with supervising. The very notion that "consulting" subordinates can somehow exempt Mr. Griffith indefinitely from the statutory obligation that he be admitted to the Utah Bar further underscores that Griffith's effort to avoid responsibility for failing to become a licensed member of the state Bar is simply too clever by half. His answers are devoid of any basis in controlling state law.

Mr. Griffith also revealed in his written post-hearing answers that in January 2004, he asked a second year law student working in his office to research "Utah laws and practices on bar admissions regarding in-house counsel." Her advice was that "the safest course for a Utah corporation would be to ask its in-house lawyers to join the Utah Bar."[16] Griffith tried to deflect the import of this advice, which he has never followed, by claiming that the student's research "did not identify" what Griffith characterized as "the

---

[14] This is also the only objective reading of a letter dated July 2, 2004 to Senator Orrin Hatch from John C. Baldwin, the Executive Director of the Utah State Bar. Indeed, Mr. Baldwin reconfirmed in his letter that "[t]hose who engage in the practice of law in Utah must be licensed by the Utah Supreme Court through the Utah State Bar. There is no general counsel exception rule which allows persons who serve in such positions to practice law without licensure." (Emphasis added.)

[15] Responses of Thomas B. Griffith to the Written Questions of Senator Patrick J. Leahy at 13 (Response 26f)(Dec. 3, 2004).

[16] Responses of Thomas B. Griffith to the Written Questions of Senator Patrick J. Leahy at 11 (Response 25; emphasis added)(Dec. 3, 2004).

consistent advice reflected in the views of the current and former officials of the Utah Bar who have written the Committee that in-house counsel in Utah need not join the local bar provided that they are associated with Utah lawyers and make no appearances or filings in court."[17] He further stated that he did not question the student's advice since "it was always my intention to join the Utah Bar."[18] Significantly, however, Griffith has never joined the Utah Bar, and he has passed up every one of at least eight opportunities he has had to take the state Bar exam since he began practicing law in Utah.

Mr. Griffith's oral testimony and his written answers reveal someone who not only has failed to comply with the very clear statute regarding the requirements for the practice of law in Utah, but also someone now seeking to avoid responsibility for that serious lapse. From his application to the Utah Bar falsely denying under oath that he had ever been "suspended" previously as a lawyer, to the responses he has given the Judiciary Committee, Mr. Griffith's answers are flatly inconsistent with his professional obligations. And the new information that he has provided about his failure to pay mandatory D.C. Bar dues further reveals an attorney who has clearly disregarded important legal requirements pertaining to his profession. Mr. Griffith's conduct, and his testimony about his conduct, are unworthy of someone seeking a lifetime judgeship on the second most important court in this country.

For all of these reasons and those set out in our letter to the Committee of November 11, 2004, the Committee should not approve

---

[17] Id. Like the letter to Mr. Griffith from Utah Bar General Counsel Fox and the letter to Senator Hatch from Bar Director Baldwin, the letter to the Committee to which Mr. Griffith referred in this answer did not state that in-house counsel could continue indefinitely to practice law in Utah without becoming licensed. And, like Mr. Griffith's written and oral testimony, it was devoid of citation to any supporting legal authority. See Letter of John A. Adams, *et al.* to Hon. Orrin G. Hatch (June 28, 2004).

[18] Responses of Thomas B. Griffith to the Written Questions of Senator Patrick J. Leahy at 11 (Response 25; emphasis added)(Dec. 3, 2004).

Mr. Griffith's nomination to the United States Court of Appeals for the District of Columbia Circuit.

Sincerely,

Ralph G. Neas
President

cc: All Members, Senate Judiciary Committee

ROBINSON BRADSHAW & HINSON

RUSSELL M. ROBINSON, II
CHARLOTTE OFFICE

DIRECT DIAL: 704.377.8311
DIRECT FAX: 704.373.3911
RROBINSON@RBH.COM

June 22, 2004

VIA FACSIMILE

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Statement in Support of the Nomination of Thomas B. Griffith to the United States Court of Appeals for the District of Columbia Circuit

Dear Mr. Chairman:

I am writing this letter in support of the nomination of Thomas B. Griffith to the United States Court of Appeals for the District of Columbia Circuit. Tom practiced law with our firm, Robinson, Bradshaw & Hinson, P.A., in Charlotte, North Carolina after his graduation from the University of Virginia Law School in 1985 until he joined the law firm of Wiley, Rein & Fielding LLP in Washington, D.C. in December 1989.

While he was with our firm, I was very impressed with his abilities. He proved to be an outstanding lawyer with a keen intellect. Tom was also a caring and compassionate human being. He was honest and fair-mind; his character and integrity are beyond reproach. Our firm was fortunate to have had him as a partner. Tom was also a dedicated family man and an active and devoted member of his church.

I firmly believe that Tom will be an outstanding appellate judge and urge the United States Senate to confirm his nomination to the United States Court of Appeals for the District of Columbia Circuit.

Very truly yours,

Russell M. Robinson, II

Russell M. Robinson, II

ROBINSON BRADSHAW & HINSON

LOUIS A. BLEDSOE, III
CHARLOTTE OFFICE

DIRECT DIAL: 704 377 8339
DIRECT FAX: 704 373 3939
LBLEDSOE@RBH.COM

June 23, 2004

VIA FACSIMILE AND REGULAR MAIL

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Statement in Support of the Nomination of Thomas B. Griffith to the United States Court of Appeals for the District of Columbia Circuit

Dear Mr. Chairman:

We write this letter in support of the nomination of Thomas B. Griffith to the United States Court of Appeals for the District of Columbia Circuit. Tom practiced law with our firm, Robinson, Bradshaw & Hinson, P.A., in Charlotte, North Carolina after his graduation from the University of Virginia Law School in 1985 until he joined the law firm of Wiley, Rein & Fielding LLP in Washington, D.C. in December 1989.

While he was with our firm, Tom impressed us all as an outstanding lawyer, a caring and compassionate counselor, and an honest and fair-minded advocate. Tom combines a scholar's mind with a keen understanding of people and institutions. As we served our firm's clients alongside Tom, we observed his ability to express his views with conviction but without insult, and to persuade the courts with force of logic and of reason, ever mindful of his duty as an officer of the Court. An accomplished legal scholar, Tom also knows how to build bridges and find solutions – important traits we believe necessary to distinguished service on the bench.

A dedicated family man and long an active and devoted member of his church, Tom is scrupulously honest, and his character and integrity are beyond reproach. If confirmed, we believe Tom's strong sense of fundamental fairness, and his commitment to impartial justice under the law will ensure that he will approach every dispute with an open mind and provide each litigant before him an equal opportunity to be heard. In sum, we firmly believe that Tom will be an outstanding appellate judge and urge the United States Senate to confirm Tom's nomination to the United States Court of Appeals for the District of Columbia Circuit.

Very truly yours,

Louis A. Bledsoe, III

Robert W. Bradshaw, Jr.

Robin L. Hinson

John R. Wester

Haynes P. Lea

Brent A. Torstrick

Edwin F. Lucas, III

Richard L. Mack

Jane S. Ratteree

Robert G. Griffin

Patrick S. Bryant

Henry H. Ralston

Edward F. Hennessey, IV

Stokley G. Caldwell, Jr.

Allen K. Robertson

Christopher W. Loeb

Benjamin W. Baldwin

David C. Wright, III

Robert M. Bryan

Allain C. Andry, IV

Robert W. Fuller

Mark W. Merritt

D. Blaine Sanders

LAB,III:ltm
cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary

Office of Legal Policy
United States Department of Justice

SANDRA ROGERS
International Vice President

1 July 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

I have worked closely with Mr. Thomas B. Griffith for the last three years in my assignment at Brigham Young University. I have mixed feelings about his nomination for a judgeship simply because as fine a judge as I believe he will be, I will miss his leadership and good judgement here at the university.

One of the things I will miss most if Tom is appointed, is his refreshing and empowering philosophy on the role of women at the university and in society in general. He was consistently supportive of my efforts and an advocate for including the wisdom and perspectives of women on critical questions facing the university. In fact, he reminds me very much of my own father who believed nothing was impossible for his daughter.

The experience that exemplifies this attitude for me came as I gave a plenary talk at the Brigham Young University Women's Conference. In the talk I encouraged women to know of their worth for themselves, not as reflected by others. Afterwards, Tom and I had a long discussion about the importance of women, his hopes for his own daughters, and his desire that the contributions of women be valued and supported.

I do not have the legal background to assess Tom's potential as a judge. But I have found him to be fair, consistent, well-prepared, and articulate in every circumstance. And I have seen personally his commitment that all individuals be treated fairly and equally.

Please know of my strongest support for Tom's nomination.

Sincerely,

Sandra Rogers

Sandra Rogers

BRIGHAM YOUNG UNIVERSITY · A-387 ASB · PROVO, UTAH 84602-1335
(801) 422-4916 / FAX: (801) 422-0688

JANET S. SCHARMAN
Student Life Vice President

June 29, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman,

I have known Tom Griffith since he was appointed to the position of Assistant to the President and General Counsel at Brigham Young University four years ago. As Student Life Vice President at BYU, I have responsibility for our special interest support offices such as the Women's Services and Resources, Multicultural Student Services, International Student Services, and the University Accessibility Center. Frequently, I call upon the help of Tom and the attorneys in his office with respect to those responsibilities.

I have come to rely heavily on Tom's advice and support. He is a very bright, experienced, and reasonable individual whose judgment I trust and greatly value. While we do not see the world from identical perspectives, I know that I will always get balanced feedback from him with important concerns. Where our views are extremely similar are with issues relating to the offices I mentioned above. Tom cares deeply about the rights of women, racial minorities, and those with disabilities.

Tom does not believe in supporting programs that might perpetuate negative stereotypes. He passionately believes in the innate potential of people, and he channels his creativity and energy towards opportunities that will allow all individuals to develop and grow regardless of their race, religion, or gender. He has been a forceful advocate for protecting and expanding opportunities for all.

I am not anxious for Tom to leave the university. At the same time, it would be a great loss for our judicial system if he were not to be considered for a position with the federal court over reasons which are ludicrous to all who know him well.

Thank you for your consideration of these thoughts.

Sincerely yours,

Janet S. Scharman

Janet S. Scharman
Student Life Vice President

cc: The Honorable Patrick J. Leahy
Office of Legal Policy

BRIGHAM YOUNG UNIVERSITY · A-333 ASB · PROVO, UTAH 84602
(801) 422-2387 / FAX: (801) 422-0646

AMERICAN UNIVERSITY
WASHINGTON, DC
DEPARTMENT OF JUSTICE, LAW AND SOCIETY

July 1, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

RE: Nomination of Thomas Griffith for U.S. Court of Appeal for District of Columbia

Dear Mr. Chairman:

I write this letter to support the nomination of Thomas B. Griffith for the United States Court of Appeals in the District of Columbia Circuit.

I met Tom Griffith for the first time when I served with him on the Commission on Opportunity in Athletics appointed by the Secretary of Education. While I was impressed with the dedication and hard work that all of the members of the Commission demonstrated, I found that Tom Griffith often asked the most penetrating questions of the witnesses called to testify about Title IX and made the most careful assessments of the mountains of documents we were asked to read. Tom is a strong supporter of Title IX both in principle and perhaps because he is the father of five daughters, all of whom are active in sports and some of whom he coaches in softball.

Both Tom and I did raise questions during the hearings about the dangers of Title IX being used as an excuse to cut or weaken men's minor sports such as wrestling and gymnastics by several universities, but these questions in no way diminished Tom's support for Title IX and his overall strong commitment to equal opportunity for women and men in high school and collegiate sports. Tom Griffith stated many times during the hearings that Title IX was one of the great landmarks in the Civil Rights legislation that has been passed over the past half century.

Sincerely,

Rita J. Simon
University Professor
Title IX Commissioner

SCHOOL OF PUBLIC AFFAIRS
4400 MASSACHUSETTS AVENUE, NW WASHINGTON, DC 20016-8043 202-885-2948 FAX: 202-885-2907

PENNSTATE

Graham B. Spanier
President

The Pennsylvania State University
201 Old Main
University Park, PA 16802-1589
814-865-7611
814-863-8583 (Fax)
E-mail: gspanier@psu.edu

June 28, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

RE: Nomination of Thomas Griffith for U.S. Court of Appeal for District of Columbia

Dear Mr. Chairman:

I write to support the nomination of Thomas B. Griffith for the United States Court of Appeal for the District of Columbia Circuit. I am the president of The Pennsylvania State University, former Chancellor of the University of Nebraska-Lincoln, a former Chair of the Division I Board of Directors of the NCAA, and the immediate past chair of the Big 10 Athletic Conference. My principal association with Mr. Griffith is that we served as colleagues on the Commission on Opportunity in Athletics appointed by the Secretary of Education.

I write because of my concern that the Senate Judiciary Committee may have received objections from some individuals who might claim that Mr. Griffith is unsupportive of Title IX, the legislation that mandated equality of educational opportunity for women. I believe that such objections are unfounded and should not be given credence. During the many months that Mr. Griffith served on the Commission charged with reviewing Title IX, I found him to be supportive of the law that established Title IX. He was, in fact, outspoken in his support for the law while thoughtfully reflecting on matters of interpretation and commenting on potential refinements to enforcement protocols.

The Commission was charged to carefully examine opportunities in athletics, and Mr. Griffiths was among the most incisive and analytical Commissioners. He listened to and reviewed the testimony of hundreds of witnesses, was compassionate in reacting to what he heard, kept an open mind about the options before the Commission, and always focused on the law and its interpretations. I was impressed with his service.

During our work, Mr. Griffith stated his belief that Title IX was one of the great landmarks in civil rights in our Nation. I also have heard him speak of his deep personal interest, as the father of five daughters, each one of whom has been active in sports. Moreover, he has had the good fortune of coaching some of his girls. He and I both had some criticisms of the way the Department of Education has at times gone about enforcing Title IX. Virtually all of the Commissioners had suggestions for refinement after hearing testimony from individuals and schools.

It is my opinion that Mr. Griffiths has served his country with integrity during his career, including his service on the Commission. I saw in him the qualities one would desire in a federal judge.

Sincerely,

Graham Spanier

Graham B. Spanier

Copies:

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510, and

Office of Legal Policy
United States Department of Justice

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF POSTSECONDARY EDUCATION

THE ASSISTANT SECRETARY

July 12, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

RE: Nomination of Thomas Griffith for U.S. Court of Appeals for the District of Columbia Circuit

Dear Mr. Chairman:

I write to support the nomination of Thomas B. Griffith for the United States Court of Appeals for the District of Columbia Circuit. I consider Tom a friend and a colleague. We share a common interest in increasing opportunities for all our citizens, young and old alike, to pursue postsecondary education.

During 2002, as an ex officio member of the Commission on Opportunity in Athletics established by Secretary of Education Rod Paige, I had the privilege of working with Tom and other members of the Commission as we studied Title IX and ways to make it better. Throughout the six months that the Commission met and heard testimony about Title IX and its impact on the lives of individual student athletes, I always found Tom to be outspoken in his support for the law. He provided thoughtful and reasoned comments with respect to differing interpretations of the law and its enforcement by the Department of Education.

Tom's deep personal interest as the father of five daughters, each one of whom has been active in sports, was clear throughout the Commission's proceedings. He shared his criticisms of the way the Department of Education has, at times, gone about enforcing Title IX in a professional manner and was always willing to hear other points of view. Tom, and virtually all of the other Commissioners, had suggestions for improvements and refinements to the Department's enforcement practices after hearing testimony from individuals and schools.

Tom was a valued member of the Commission for both his candor and his passion for increasing athletic opportunities for women and men. Tom has all the qualities one would desire in a federal judge.

Sincerely,

Sally L. Stroup

Copies:

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510, and

Office of Legal Policy
United States Department of Justice

HARVARD LAW SCHOOL

CAMBRIDGE · MASSACHUSETTS · 02138

WILLIAM J. STUNTZ
Professor of Law
617-496-0555
stuntz@law.harvard.edu

June 21, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

I write in support of Tom Griffith, who has been nominated for a seat on the D.C. Circuit. I've known Tom for more than twenty years; he and I went to law school together at the University of Virginia, and we've kept in touch ever since. I believe I know him well. Few people I know deserve to be called wise; *very* few deserve to be called both wise and good. Tom is a wise and good man. I believe he will be one of this nation's finest judges.

There are two sets of characteristics to look for in a prospective appellate judge. The first is intellectual horsepower. Federal courts of appeal handle problems of incredible range and complexity; judges must be able to analyze and break down those problems quickly and correctly. Tom is more than qualified on that score. He was one of the smartest people I knew during my time at Virginia, and he is more than just smart — he is genuinely *thoughtful*. He understands that he doesn't understand everything (a rare characteristic among smart lawyers, in my experience). He also understands that law is not an abstract mind game, that real lives are at stake in legal decisions. And that a just legal system cannot decide cases by running them through some partisan or ideological grid. Those understandings lie at the heart of wisdom. Few people have it. Tom does.

The second set of traits goes to character. This is where Tom really shines. When we were in law school together, I thought Tom was the finest human being I knew, and his decency and integrity have only grown since then. He is unfailingly modest and moderate, decent and empathetic. He does not have an arrogant bone in his body. (There are not very many talented

lawyers about whom one could write that last sentence.) His integrity and selflessness are evident to all who know him.

I know a great many talented men and women in America's legal profession; I've taught more than three thousand students at three top law schools, and I have friends scattered across the country in various kinds of law practice and in academics. I do not know *anyone* whom I would rather see on the federal bench than Tom Griffith. If he is confirmed, he will not just be a good judge. He'll be a great one. This is one vote of which you will always be proud.

Sincerely yours,

William J. Stuntz

cc: The Honorable Patrick J. Leahy
Office of Legal Policy

United Nations
Nations Unies

International Criminal Tribunal for the former Yugoslavia

Tribunal Pénal International pour l'ex-Yougoslavie

22 June 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

VIA FACSIMILE 202-228-1698

Dear Mr. Chairman:

I am very pleased to recommend Mr. Thomas C. Griffith for appointment to the United States District of Columbia Court of Appeals. Mr. Griffith is a lawyer of the highest character and legal ability and would make an excellent addition to the Court.

I have had the good fortune of working with Mr. Griffith for a number of years during my tenure as the Executive Director of the American Bar Association Central European and Eurasian Law Initiative (CEELI). In addition to serving on the CEELI Advisory Board, Mr. Griffith traveled with me to a number of countries on behalf of the CEELI program, including Croatia, Serbia, Russia, Czech Republic and several other countries, participating in our work training of judges and lawyers in these countries. He showed considerable legal skill and knowledge during these visits and was very helpful to us in explaining legal concepts to these legal professionals as well as demonstrating a very fair-minded approach to the law. He has been particularly active in working to establish a regional judicial training institute in Prague (the CEELI Institute) and without his tireless efforts and commitment, this important project would not gotten off the ground.

I have also had the pleasure of attending many meetings with Mr. Griffith with Congressional leaders in both the United States Senate and House of Representatives, including members of both major political parties. He is clearly highly respected by Members of Congress and their staff, no doubt due to his manifest integrity as well as his outstanding abilities as a lawyer. I would also note that he and I also started our legal practices in the same city (Charlotte, North Carolina) and while I did not know him personally at that time, I can attest that he enjoyed a very high reputation in the legal profession there as well.

As the Deputy Registrar of the International Criminal Tribunal for the former Yugoslavia in The Hague, Netherlands and in my previous work as the Chief of Staff to the Tribunal's President, as well as my twenty-plus years of experience as a practicing lawyer, international legal academic, UN official and in non-governmental legal world, I have dealt with many lawyers and judges from throughout the United States and the world, including all the major legal systems. Mr. Griffith is without question one of the best professionals with whom I have worked, given not only his capability as a lawyer but his integrity as a person. He also shows an open-minded approach to legal and other issues, and I have discussed many issues with him, a number of which we come at somewhat different angles, and his intellectual honesty and integrity are outstanding.

I am thus pleased to highly recommend Mr. Griffith. He would make an outstanding judge for the Court. His strong legal abilities, high character and integrity and strong commitment to the Constitution would serve the Court extremely well.

Sincerely,

David Tolbert
Deputy Registrar

cc: The Honorable Patrick J. Leahy, Ranking Member, Committee on the Judiciary
Office of Legal Policy, United States Department of Justice

JUN-18-2004 15:02 FROM:COORS LEGAL NH314 3032776212 TO:2022285797 P.1/2

Samuel D. Walker, Esq.
5330 South Marshall Street
Littleton, Colorado 80123

June 18, 2004

VIA FACSIMILE: 202-228-1698

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

I am pleased to support the nomination of Thomas B. Griffith to the United States Court of Appeals for the District of Columbia Circuit.

Tom and I began law practice on the same day in 1985, joining the law firm of Robinson, Bradshaw & Hinson in Charlotte, North Carolina. Tom has been a close personal friend and professional colleague ever since. I left Charlotte to join the Bush-Quayle administration in 1989. Tom came to Washington shortly thereafter and eventually recruited me to join his law firm, Wiley Rein & Fielding LLP, in 1992. We practiced together until he became counsel to the U.S. Senate, and again until he became general counsel at Brigham Young University. (I left Wiley Rein in 2002 to become the U.S. and worldwide chief legal officer and public affairs vice president for Coors Brewing Company in Golden, Colorado, my current job.)

I can think of no finer candidate than Tom for this all-important judgeship. He has an uncommonly keen mind. His expertise in administrative law, refined in the crucible of the U.S. Senate, will make a unique contribution to the D.C. Circuit. Moreover, I have witnessed Tom's commitment to integrity and ethics in countless situations over the years. Never once have I seen him display anything less than a rigorous commitment to the truth.

On a personal note, Tom is patient and fair. He will bring an excellent demeanor to the bench.

I hope these observations are of assistance to your Committee.

Very Truly Yours,

Samuel D. Walker

Lynn D. Wardle
3359 Cherokee Lane
Provo, UT 84604
TEL. (801)375-9591 (h); 422-2617 (o); FAX 801-422-0391; Email: wardlelm@joimail.com or wardlel@lawgate.byu.edu

June 18, 2004

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510
via fax- 202-228-1698

Dear Mr. Chairman:

I write to express my strong personal support for the nomination of Thomas B. Griffith to serve as a Judge on the U.S. Court of Appeal for the District of Columbia. I have some professional and personal knowledge of Mr. Griffith, and of the court to which he has been nominated. I am a law professor at the J. Reuben Clark Law School at Brigham Young University, and have known Tom well as a neighbor, fellow-lawyer, member of the university community, and fellow church service volunteer for the past four years.

Tom has set an outstanding example of professional excellence while serving as the General Counsel at Brigham Young University. He is committed to the highest standards of legal service and of legal education, and he has contributed significantly to helping our law students understand the importance of setting high standards and of working hard to prepare to accomplish their highest professional aspirations. He has made exceptional presentations to our students about his own remarkable legal experiences, and he has brought a number of remarkable professional leaders to speak to the law school and university, including present and former members of the Office of Counsel to the President (of both political parties), Senators, members of the President's Cabinet, and other persons of significant experience and influence in Washington, D.C., with whom he has contact. He was the moving force behind the convening of an outstanding symposium of former U.S. Solicitors General that met here at Brigham Young University. It was his vision and encouragement that initiated the conference, and it was through his great personal effort that we were able to get every living Solicitor General except one to attend and participate. The resulting law review issue provided the most comprehensive glimpse into the operation of that most important government legal office, and into the work of the U.S. Supreme Court's "Tenth Justice," as the Solicitor General has been called. Tom has made these extraordinary contributions without any official position in or remuneration from the law school, and on top of the heavy responsibilities he has as a "working lawyer," the General Counsel for Brigham Young University. That exemplifies his commitment to excellence in the legal profession.

Second, I have had occasion to discuss many difficult legal issues with him, and I have discovered that Tom Griffith has a very sharp, well-trained legal mind. His analysis of complex legal issues is very cogent and insightful. Despite his own brilliance and significant experience, he is not just willing but anxious to consider new perspectives. He is very respectful of others, and is comfortable working with and listening to those who have different views. He is a rare true intellectual, alive intellectually, anxious to learn, and teachable. Tom also is a respecter of

the rule of law, and of the institutions and processes of our government, but he is not a rigid, and resists "perfectionism" as well as laziness and lawlessness.

Third, Tom Griffith has a kind and gentle heart and a genuinely friendly personality. Time and again in our volunteer service I have seen Tom show exceptional kindness, mercy, and tolerance. He has a great sympathy for those on the margins of society, the poor, the disadvantaged, the sick, the wounded, the discouraged, and the deprived. He is quick to note unfairness and to criticize abuse of power. Near the top of his list of personal heroes is Mother Teresa of Calcutta and the Sisters of Charity because of their selfless dedication to serving "the least" in society, with no thought of personal gain. One of Tom's favorite writer is C.S. Lewis, who combined great intellect with genuine morality and great faith. Tom strives to unite his tremendous legal skill and great intellect with commitment to the highest standards of ethical professionalism and high principle.

Finally, I myself was first admitted to the bar of the District of Columbia, while I was clerking for Judge John J. Sirica of the U.S. District Court for the District of Columbia. The Court of Appeals sat a few floors above our court, and the appellate and district judges had their chambers in the same building. I understand the complex regulatory and administrative matters that often are on the docket of federal courts in the District of Columbia. Tom Griffith is exceptionally well qualified to serve on that particular court and to address the kinds of issues that come before it. I have total confidence that Tom Griffith will make an outstanding contributions to the work of the U. S. Court of Appeals for the District of Columbia, and his appointment will enhance the judicial branch of our national government. I also realize how important it is that the D. C. Circuit have enough qualified judges to operate effectively, and believe that it is in the country's interest to not delay any further filling the vacancy for which Mr. Griffith has been nominated.

Thus, I recommend that the Senate Judiciary Committee and the full Senate act promptly to confirm Thomas B. Griffith to serve as a Judge on the U. S. Court of Appeals for the District of Columbia.

Sincerely,

Lynn D. Wardle

Lynn D. Wardle
Professor of Law

cc: The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
152 Dirksen Senate Office Building
Washington, DC 20510, and
via fax- 202-224-9516

Office of Legal Policy
United States Department of Justice
Washington, DC
via fax - 202-514-5715

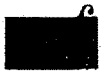
June 7, 2004

To the Editor:

Friday's article by Carol D. Leonig about the nomination of Thomas Griffith ("Appeals Court Nominee Let His Bar Dues Lapse"), prompts this letter in praise of Mr. Griffith's nomination. I have known Tom since he was Senate Legal Counsel and I was Solicitor General, and I have the highest regard for his integrity. While his reported lapse in the payment of D.C. Bar dues should certainly be explored by the Senate Judiciary Committee, Tom's account of the circumstances is eminently reasonable and largely corroborated. What is more, for my own part I would stake most everything on his word alone. Litigants would be in good hands with a person of Tom Griffith's character as their judge.

Yours sincerely,

Seth P. Waxman



Wiley Rein & Fielding LLP

1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000
FAX 202.719.7049

7925 JONES BRANCH DRIVE
SUITE 6200
McLEAN, VA 22102
PHONE 703.905.2800
FAX 703.905.2820

www.wrf.com

June 21, 2004

Richard E. Wiley
202.719.7010
rwiley@wrf.com

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Hatch:

As a former law partner of Tom Griffith, and as a long time observer of his legal career, I write to urge Senate confirmation of his appointment to the U.S. Court of Appeals for the District of Columbia Circuit. Tom is an outstanding lawyer, with keen judgment, congenial temperment and impeccable personal integrity. He would bring great expertise and fair-minded impartiality to the bench and, in my judgment, would be a considerable credit to the D.C. Circuit and the Federal Judiciary as a whole.

During his tenure at our firm, both as an associate and partner, Tom was universally liked and respected by his colleagues, whatever their professional background or political identification. He brought remarkable intellectual vigor to his work, and was considered by all as one of our most talented litigators. Speaking personally, I also admired his dedication to family and various public and religious activities. In short, Tom is a wonderful person and an exceptional professional, and I recommend him to you without qualification.

Thank you for your consideration of this letter and best regards.

Sincerely yours,

Richard E. Wiley
cc: The Honorable Patrick J. Leahy
Office of Legal Policy, United States Department of Justice

March 7, 2005 VIA FACSIMILE

The Honorable Arlen Specter, Chair
Senate Judiciary Committee
711 Hart Building
Washington, D.C. 20510

The Honorable Patrick J. Leahy, Ranking Member
Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, D.C. 20510

Re: *Opposition to Griffith renomination to D.C. Circuit*

Dear Senators Specter and Leahy:

We, the undersigned women's rights, civil rights and other organizations, write to express our opposition to the confirmation of Thomas Griffith to the U.S. Court of Appeals for the District of Columbia Circuit. Mr. Griffith's record, which demonstrates a lack of regard for the rule of law and hostility toward critical civil rights protections, makes him unsuitable for a lifetime seat on the federal bench, especially for the court that is widely regarded as second only to the Supreme Court in national importance.

Our concerns about this nomination stem from Mr. Griffith's record in two areas: (1) his disregard for the requirements for the practice of law in two jurisdictions over a period of several years, and his misleading statements about these lapses, and (2) his record of hostility toward a key component of Title IX of the Education Amendments of 1972 and dismissive attitude toward legal precedents inconsistent with his views on Title IX. Mr. Griffith's views on Title IX also raise serious concerns about his attitude toward other critical civil rights protections.

Mr. Griffith's Unlicensed Practice of Law in D.C. and Utah

It has come to light that Mr. Griffith violated the rules of his profession by practicing law in two different jurisdictions—the District of Columbia and Utah—without a valid license over a period of several years. First, Mr. Griffith was suspended from the D.C. Bar on two occasions—for approximately a month in 1997, and then for three years from 1998 until 2001—for failing to pay his bar dues. Mr. Griffith nonetheless continued to practice law in D.C., including for over a year as a partner in the law firm of Wiley, Rein, & Fielding.[1] Making matters worse, when Mr. Griffith paid his back bar dues in November 2001, he tried to explain the lapse by stating that "notice for payment of dues was evidently sent to my former law firm which I left in 2000"—when, in fact, he had been suspended even before he joined the law firm.[2]

---

[1] Responses of Thomas B. Griffith to the Written Questions of Senator Patrick J. Leahy, Dec. 3, 2004, at 2-3.
[2] *Id.* at 6.

In 2000, Mr. Griffith moved to Utah and began to practice law as the General Counsel of Brigham Young University, but—despite a provision of Utah law which prohibits the practice of law by individuals "not admitted and licensed to practice law within this state"[3]—he did not become a member of the Utah Bar. In fact, even though the General Counsel of the Utah Bar advised Mr. Griffith in writing nearly two years ago that he should take the Utah Bar Exam, he has never done so.[4]

Documents made public at Mr. Griffith's November 2004 hearing before the Committee also raise serious concerns about whether he gave accurate information while under oath to the Utah Bar about the lapses in his Bar membership. Specifically, in a sworn November 2003 application to take the Utah Bar examination (an exam he never took), Mr. Griffith was asked whether he had ever been suspended as an attorney, and he answered "no"—despite the fact that he had twice been suspended from the District of Columbia Bar for nonpayment of dues.[5] In the same application, Mr. Griffith stated that when he had acted as an attorney as General Counsel of BYU, he had "done so as a member of the Bar of the District of Columbia"—despite the fact that he had been suspended from the District of Columbia Bar for over a year while he was working at BYU.[6]

A nominee to a lifetime seat on the federal bench should be required to have the highest respect for the rule of law. But as shown, Mr. Griffith has repeatedly failed to comply with the rules that apply to his own membership in the Bar, and then has misrepresented that failure under oath.

Mr. Griffith's Title IX Record and Its Relevance to Other Civil Rights Laws

Mr. Griffith also has a record of hostility to a key component of Title IX, the landmark federal law that prohibits sex discrimination in education and that has opened up tremendous athletic opportunities for girls and women across the country. As a member of the Secretary of Education's Commission on Opportunity in Athletics in 2003, Mr. Griffith not only joined in a series of Commission recommendations that would have done serious damage to Title IX, but he offered an even more extreme proposal of his own.

Mr. Griffith's proposal was to eliminate one well-established way that schools can come into compliance with Title IX's non-discrimination requirement in athletics – the "substantial proportionality" test. This test, one of the three alternative ways to comply with Title IX, allows educational institutions to comply by offering athletic opportunities to male and female students that are in substantial proportion to each gender's representation in the student body of the school. Eliminating this test could be fatal to Title IX's effectiveness – a fact seemingly

---

[3] Utah Code § 78-9-101; *see also* Carol D. Leonnig, *Judicial Nominee Practiced Law Without License in Utah* Washington Post, June 21, 2004, at A1.

[4] Letter from Katharine A. Fox, General Counsel, Utah State Bar, to Thomas B. Griffith, May 14, 2003 ("Utah does not have and has never had [a general counsel rule exception] . . . You are fortunate, however, to have a viable option remaining, i.e., admittance by examination and I would encourage you to start preparing your application as soon as possible.")

[5] Utah State Bar Examination Application, Thomas B. Griffith, Nov. 19, 2003, question 52.

[6] *Id.* at question 46; *see also* Carol D. Leonnig, *Court Nominee Gave False Data, Text Shows*, Washington Post, Nov. 17, 2004, at A25.

recognized by the Commission, which rejected the Griffith proposal by a lopsided vote of 11 to 4. Indeed, Mr Griffith himself subsequently called his proposal "radical."[7]

The proportionality test embodies the principle at the heart of Title IX: that men and women are entitled to equal access to educational opportunities without regard to their gender or stereotypes about their abilities and interests. As every federal courts of appeals to consider the issue has recognized, and every Administration since 1979 has understood, the three-part test is legally valid and does not impose quotas.[8]

Attempting to explain his opposition to the proportionality test during Commission proceedings, Mr. Griffith claimed that the test violates the Constitution and is "illegal," "unfair" and even "morally wrong."[9] This view flies in the face of the decisions of no fewer than six federal appeals courts which have upheld the legality of the test (and none has ruled to the contrary).[10] When confronted with the fact that his view of Title IX was in conflict with numerous and uniform appellate court rulings, Mr. Griffith cavalierly asserted that the courts got it "wrong," and stated, "I for one don't believe in the infallibility of the judiciary."[11]

Mr. Griffith's attempts to explain away his radical views on Title IX, in responses to written questions from several Senators and in a November 19, 2004 letter to then-Chairman Hatch, do nothing to resolve our concerns. Despite having previously called the proportionality test "illegal," and stating that the courts got it "wrong" in holding to the contrary, in his written answers Mr. Griffith said that he opposed the proportionality test merely because some have "misused" or "misinterpreted" the test to create quotas.[12] Mr. Griffith's current explanations are belied by his proposal to eliminate the proportionality test in its entirety, and do not acknowledge, much less explain, his prior categorical rejection of the legality of the test.

Mr. Griffith's views on Title IX also raise concerns about his approach to other critical civil rights issues. His opposition to "numeric measures" even in sex-segregated athletics, where they are simply a means of determining whether discrimination is occurring in the allocation of numerically-fixed opportunities, logically suggests that he would be at least as hostile to

---

[7] CD-Rom recording of remarks at 43rd Annual Conference of National Association of College and University Attorneys, June 22, 2003.

[8] *See, e.g., Cohen v. Brown University*, 101 F.3d 155, 170 (1st Cir. 1996) ("No aspect of the Title IX regime at issue in this case—inclusive of the statute, the relevant regulation, and the pertinent agency document—mandates gender-based preferences or quotas, or specific timetables for implementing numerical goals.")

[9] Transcript of Commission hearing, Jan. 30, 2003, at 27.

[10] *See Miami University Wrestling Club v. Miami University*, 302 F.3d 608 (6th Cir. 2002); *Chalenor v. University of North Dakota*, 291 F.2d 1042 (8th Cir. 2002); *Pederson v. Louisiana State University*, 213 F.3d 858 (5th Cir. 2000); *Neal v. Board of Trustees of The California State Universities*, 198 F.3d 763 (9th Cir. 1999); *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996) (Cohen II), *cert. denied*, 520 U.S. 1186 (1997); *Kelley v. Board of Trustees, University of Illinois*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 513 U.S. 1128 (1995). Three additional courts have concluded that the Title IX policies were entitled to deference without specifically considering the proportionality test; *see McCormick v. School District of Mamaroneck*, 370 F.3d 275 (2d Cir. 2004); *Williams v. School District of Bethlehem*, 998 F.2d 168 (3d Cir. 1993); *Roberts v. Colorado State Board of Agriculture*, 998 F.2d 824 (10th Cir. 1993), *cert. denied*, 510 U.S. 1004 (1993).

[11] Transcript of Commission hearing, Jan. 30, 2003, at 28, 106.

[12] *See, e.g.*, Response of Thomas B. Griffith to the Written Questions of Senator Edward M. Kennedy, Dec. 3, 2004, at 1, 3.

numerical approaches in other areas of civil rights law where no such explicit segregation even exists. These include affirmative action remedies for discrimination in employment or contracting, or statistical evidence to prove that facially neutral employment practices have a disparate, adverse impact on women or racial or ethnic minorities. Although Mr. Griffith claimed in responses to Senators' questions that his views on Title IX are not "a criticism of the use of statistical evidence in civil rights disputes,"[13] this claim simply cannot be squared with his earlier statements that "numeric formulas" are illegal and are a "fundamentally unfair way of going about remedying discrimination."[14]

Mr. Griffith's bar membership issues, his failure to address them accurately, and his dismissive attitude toward court decisions with which he does not agree, demonstrate a pattern of lack of respect for the rule of law. Together with his demonstrated hostility towards important civil rights protections, this record makes him unsuitable for confirmation to a lifetime position on the D.C. Circuit. Accordingly, we urge you to take a stand against this nomination.

Sincerely,

Alliance for Justice
American Association of University Women
Americans for Democratic Action
California NOW
Committee for Judicial Independence
Feminist Majority Foundation
Idaho NOW
Indiana NOW
Jefferson County Kentucky NOW
Leadership Conference on Civil Rights
Legal Momentum
Maine Women's Lobby
Mat-Su Alaska NOW
Mexican American Legal Defense and Educational Fund
Minnesota NOW
MoveOn.org
Myra Sadker Advocates
Nation Associates of Orange County
National Association for the Advancement of Colored People
National Association of Collegiate Women Athletics Administrators
National Council of Jewish Women
National Employment Lawyers Association
National Lawyers Guild San Francisco Bay Area
National Organization for Women
National Partnership for Women & Families
National Women's Law Center

[13] *See, e.g.*, Response of Thomas B. Griffith to the Written Questions of Senator Edward M. Kennedy, Dec. 3, 2004, at 3.
[14] Transcript of Commission hearing, Jan. 30, 2003, at 107.

National Women's Political Caucus
New Mexico NOW
NOW Nevada
NOW New Jersey
NOW New York State
Pennsylvania NOW
People for the American Way
Unitarian Universalist Project Freedom of Religion
USAction
Virginia NOW
Wisconsin NOW
Women's Sports Foundation
YWCA USA

cc: Senate Judiciary Committee

June 2, 2004

The Honorable Orrin Hatch, Chair
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Patrick Leahy, Ranking Member
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Nomination of Thomas Griffith to D.C. Circuit

Dear Chairman Hatch:

Founded in 1974 by Billie Jean King, the Women's Sports Foundation is a national charitable educational organization seeking to advance the well-being and leadership skills of girls and women through sports and fitness. On behalf of the 10,000 members and donors of the Women's Sports Foundation and the thousands of champion female athletes who have worked on behalf on the Foundation to encourage gender equity and increased opportunities for girls and women in sports, we submit the following comments objecting to the nomination of Thomas B. Griffith to the U.S. Court of Appeals for the District of Columbia Circuit.

Title IX states:

> *No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance.*

Thirty-two years after Title IX's equal opportunity and treatment mandate the playing field is still not level. Despite almost even enrollment of males and females at the high school level, males have 1.1 million more opportunities to play sports than females. At the college level, while women comprise 56% of college enrollment, they receive only 42% of all participation opportunities. Female collegiate athletes receive $137 million in athletic scholarships - 28% less than men receive per year. In addition, women receive $1.05 billion or 78.75% less sport operating budget dollars than college male athletes, and $36 million or 102% less on recruitment.

Currently, Thomas Griffith is senior legal counsel for Brigham Young University, but he served as a member of the President's Commission on Opportunity in Athletics from June of 2002 to July of 2003. Ultimately, the Commission's final report suggests that the Office of Civil Rights alter the way that Title IX compliance is measured. While a number of the Commission's recommendations would have drastically limited the effectiveness of Title IX's three-part test, one of Griffith's proposals during the eight month public deliberation proved most extreme. So extreme, in fact, that it was rejected by the Commission.

In January of 2003, at the Commission's Town hall meeting in Washington, DC Griffith proposed that Title IX's substantial proportionality test be removed completely from the three-part-test that schools currently use to comply with Title IX requirements. Specifically, he stated:

> *I am unalterably opposed to any numeric formulas which attempt to capture the spirit of Title IX...Numeric formulas violate the express terms of the statute. They violate the equal protection clause of the Constitution. They are morally wrong and they are logically flawed. There is no connection between gender ratios in the undergraduate enrollment and interest in athletics, any more than there is interest in any discipline. The fundamental evil Title IX combats is treating individuals as members of a class defined by their gender...The Department of Education never should have, nor should it now continue, any remedy that relies on numeric formulas. It is illegal, it is unfair and it is wrong (Town hall Meeting, Washington DC, January 30, 2003).*

It should be duly noted that Griffith's views on the topic of substantial proportionality and Title IX compliance are contrary to those of each of the eight Circuit Courts of Appeals that have considered, and upheld, the three-part test.

In a later discussion, fellow Commission member Cary Groth asked Griffith to explain how the Courts have upheld substantial proportionality despite his negative interpretation of the statute. Griffith replied that, "...I think the Court's got it wrong," and in his final recommendation to the Commission proposed that "the Office of Civil Rights should not use numeric formulas to determine whether an institution is in compliance with Title IX (Town hall Meeting, Washington DC, January 30, 2003). The proposal failed by a Commission vote of 11-4.

Not only was Griffith's proposal rejected, but a number of his colleagues felt compelled to voice opposition to his radical suggestion. First, Commissioner Julie Foudy asked, "Tom, if you don't have any quantifiable goal in this and the goal of Title IX is to prevent discrimination, then how, in effect, do you do that without some measure?"

Fellow Commissioner, Deborah Yow, Athletic Director at the University of Maryland also disagreed with Griffith's explanation by stating:

> *Those of us who have come through the rank in athletics, first as athletes, coaches, administrators, know that even when we can identify discrimination, the process you have to go through to ever, ever remedy that is so cumbersome, takes so much time and there is so many problems, is fraught with problems just to get*

> *those things taken care of, that when we look at in the aggregate and think about what it's really been like...I gravitate toward a numerical formula. So that I know what the target is, I know if I don't hit the target then I have a problem.*

Finally, Ted Leland, the Commission Chair, rejected Griffith's proposal saying:

> *I will vote against this. The problem I have with no numericals, it seems to me we put the burden of proof on the student. Now they have to prove they've been wronged, and...I would rather have the a burden on us to deal with a messy, complicated formula than put the burden on female students who come to school and all they want to do is play their sport and go to school, and all of a sudden they are involved in this set of issues.*

Even the June 11, 2003 final clarification letter, which was issued at the close of the Commission process by the U.S. Department of Education's Office of Civil Rights, confirmed just how far outside the mainstream Mr. Griffith's proposal was. The letter states:

> *First, with respect to the three-prong test, which has worked well, OCR encourages schools to take advantage of its flexibility, and to consider which of the three prongs best suits their individual situations...Each of the three prongs is thus a valid, alternative way for schools to comply with Title IX.*

The Women's Sports Foundation believes Griffith's opinions on Title IX to be extremist and inconsistent with current case law. We strongly urge the Senate Judiciary Committee to reject the nomination of Thomas Griffith for the U.S. Court of Appeals for the District of Columbia Circuit. In addition, we are acutely aware that this issue will continue to appear before the Courts, and hope that you take Griffith's views on Title IX into account in evaluation of his nomination for the D.C. Circuit seat. Thank you for your consideration of these comments.

Sincerely,

Dawn Riley

Dawn Riley
President
The Women's Sports Foundation

Cc: Members of the Judiciary Committee

○